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Report on

The Crown as Creditor: Priorities and Privileges

LAW REFORM
COMMISSION OF
BRITISH COLUMBIA

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LAW REFORM COMMISSION OF BRITISH COLUMBIA

REPORT ON THE CROWN AS CREDITOR: PRIORITIES AND PRIVILEGES

LRC 57

October 1982

The Law Reform Commission of British Columbia was established by the *Law Reform Commission Act* in 1969 and began functioning in 1970.

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TO THE HONOURABLE ALLAN WILLIAMS, Q.C.,
ATTORNEY GENERAL OF THE PROVINCE OF BRITISH COLUMBIA

The Law Reform Commission of British Columbia has the honour to present the following:

REPORT ON
THE CROWN AS CREDITOR: PRIORITIES AND PRIVILEGES

The Crown, in its capacity as creditor, enjoys a unique privilege under our law. One aspect of its special position is its prerogative right to prior payment. It also has the benefit of a large number of provincial statutes which create liens over real and personal property to secure money that is payable to the government or its agencies. Such liens tend to be legislated on an *ad hoc* basis and their scope and priorities are often uncertain. There is no evidence in the statutes of any uniform policy or of a consistent set of principles with respect to such liens.

This Report examines the priorities and privileges of the Crown at common law and under statute. Recommendations are made for the abolition or modification of some of the Crown's special privileges and priorities with a view to rationalizing this area of the law and achieving an appropriate balance between the needs and expectations of government, its debtors, and third parties.

CHAPTER I INTRODUCTION

A. Background to this Study

In 1972 the Commission issued a Report on the Legal Position of the Crown.[1] In that Report we examined several legal advantages enjoyed by the Crown and its agencies that were not available to the ordinary citizen. Appropriate recommendations were made which have since been implemented.[2] That Report, however, was not as comprehensive as it might have been and some matters had been excluded from the terms of reference of the study. As we explained in the Report:[3]

> A number of the problem areas excluded by those terms of reference are highly complex and technical. To have undertaken the sort of study which would be required to deal with these areas in a proper fashion would have significantly delayed the production of this final Report. The Commission feels there is an urgent need for reform of the law relating to Crown immunity in this Province and that, on balance, the ends of justice are better served by the production of this Report covering the most critical areas at this time than by the production of a more comprehensive Report at a later date.

The speed with which our recommendations were implemented reinforces our view that this was the proper approach.

One of the special advantages enjoyed by the Crown which was not considered in our earlier study is the right of the Crown to payment of its claims in priority to those of a competing creditor. Depending on the nature of the Crown's claim, this right of prior payment may arise out of the Crown prerogative at common law or under the provisions of particular statutes. It is this right which forms the subject-matter of this Report.

We should say at the outset that we approach this subject with a particular predisposition. In prior Reports we have stated our belief that in any private law matter where the interests of a government and those of a citizen conflict, the citizen should be in no worse legal position than would be the case if he were competing with another citizen.[4] That view applies in this Report.

This is not to say that the special position of the Crown can never, in any circumstance, be justified. Our view is simply that no aspect of it should be accepted uncritically and that the burden of justifying it is not easily discharged.

While there may be circumstances in which the priority of Crown claims over those of competing creditors may be justifiable there may also be cases in which the claims of the Crown ought, in justice, to be subordinated. Again, we approach the issue with the view that parity should be the order of the day unless a cogent case can be made for deviation from that principle.

B. The Scope of the Study

Since this Report is concerned with Crown priority, a series of preliminary questions arise. What is meant by "the Crown," and what are its various aspects, activities and agencies that enjoy or share its priority? These issues are explored in the following chapter. In succeeding chapters, we consider the common law origin of the Crown prerogative, the extent to which it has been abrogated by statute, and the priority given to the Crown by legislation. We consider some of the techniques used by the Crown in asserting its claims, including the important issue of Crown liens, which have attracted criticism in recent years. Also discussed are some of the problems that can arise in a federal system because of competition between the federal and provincial manifestations of the Crown.

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[1] Law Reform Commission of British Columbia, Report on Legal Position of the Crown (LRC 9, 1972)—hereafter cited as "LRC 9."

[2] *Crown Proceeding Act*, R.S.B.C. 1979, c. 86; *Interpretation Act*, R.S.B.C. 1979, c. 206, s. 14 (1).

[3] *Supra*, n. 1 at 8.

[4] *Ibid.* at 7. *See also* Law Reform Commission of British Columbia, Report on Tort Liability of Public Bodies (LRC 34, 1977), Law Reform Commission of British Columbia, Report on The Recovery of Unauthorized Disbursements of Public Funds (LRC 48, 1980).

At the heart of the study is an "evaluation" of Crown priority, both as a general issue and in particular circumstances. The principles derived from this evaluation are then translated into proposals for modification of the law.

C. The Working Papers

This Report is principally based upon a Working Paper issued by the Commission in 1981 in which tentative proposals for reform were suggested. The Working Paper was circulated for comment to the judiciary, practising lawyers, accountants, financial institutions, various ministries within the government and other interested persons. Many submissions were received and these were of great value to us in assessing our original proposals and formulating the final recommendations contained in this Report. The recommendations made in respect of the Crown's right of distress (Recommendation 10) were based on proposals made in a Working Paper on Distress for Rent and Other Debts issued in 1980. That Working Paper was also circulated widely.

CHAPTER II

WHAT IS THE CROWN[1]

A. Definition of Crown

The word "Crown" may be confusing to some. In law the Crown is a term of art, the meaning of which bears little resemblance to the chattel that sits in the Tower of London to be gazed at by sightseers.[2] The "Crown" is a metonymy for Her Majesty Elizabeth II in her legal personage as Sovereign. The expression describes[3]

> . . . the corporate legal entity to which the law ascribes the legal rights and obligations of the various semi-sovereign units of government created by the British North America Act.

It is necessary to speak of the Crown in the right of "the particular unit of government." Therefore the Crown for our purposes is Her Majesty in the right of British Columbia. It is sometimes said that the Crown is "one and indivisible"[4] but this notion must be reconciled with the fact that there are eleven "semi-sovereign units of government" or "Crowns" in Canada.

It is important to emphasize that the "Crown" is really synonymous with the "government." As Lord Diplock has pointed out, the "Crown" denotes the "government":[5]

> . . . a term appropriate to embrace both collectively and individually all of the ministers of the Crown and parliamentary secretaries under whose direction the administrative work of government is carried on by the civil servants employed in the various government departments. It is through them that the executive powers of Her Majesty's government in the United Kingdom are exercised, sometimes in the more important administrative matters in Her Majesty's name, but most often under their own official designation. Executive acts of government that are done by any of them are acts done by "the Crown" in the fictional sense in which that expression is now used in English public law.

There is nothing mysterious about the government. As Laski wrote:[6]

> Crown in fact means government, and government means those innumerable officials who collect our taxes and grant us patents and inspect our drains. They are human beings with the money-bags of the State behind them.

The study of the Crown is then a study of the government. For this reason the two words are used interchangeably in this Report.

B. Crown Activities

The growth of government over the past few years has been remarkable. Nowadays the administration of government impinges upon most fields of endeavour. The colloquial phrase "big government" is descriptive of a well recognized phenomenon. The increased intervention by government in activities formerly unregulated, or in functions formerly performed by private individuals or companies, raises legal issues as to the position of the particular arm of the Crown so intervening.

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[1] To those reading this Report in conjunction with LRC 9, we admit to having drawn freely on our earlier work in the preparation of this chapter.

[2] Constitutional History of England 418; *see also* Mundell, *Legal Nature of Federal and Provincial Executive Governments: Some Comments on Transactions Between Them* (1960) Osgoode H.L.J. 56.

[3] Dale Gibson, *Interjurisdictional Immunity in Canadian Federalism* (1969) 47 Can. B. Rev. 40.

[4] *Ibid.* at 41.

[5] *Town Investments* v. *Dept. of Environment*, [1977] 2 W.L.R. 450 at 456 (H.L.); and *see Ranaweera* v. *Ramachandran*, [1970] A.C. 962 at 973 (P.C.). *See also Formea Chemicals* v. *Polymer Corp.*, [1968] S.C.R. 754 and s. 14 of *The Proceedings Against the Crown Act* of Saskatchewan R.S.S. 1965, c. 87, s. 14, which states "In proceedings under this Act the Crown shall be designated 'The Government of Saskatchewan'."

[6] H. J. Laski, *The Responsibility of the State in England*, (1919) 32 Harv. L. Rev. 447, 472 as quoted by Peter W. Hogg, *Liability of the Crown*, 10 (1971).

Since the Crown may enjoy special advantages, it is important to know who are Crown servants and agencies who share therein. The scope of present Crown activities defines the magnitude of the issue. In British Columbia there are more than one hundred agencies that might qualify as an emanation of the Crown. These government agencies engage in a broad range of diverse activities, sufficiently well known to make it unnecessary to give examples.

C. Crown Agents and Crown Corporations

The activities of the Provincial Government fall into three categories. First are the various ministries, such as the those of Agriculture, Labour, Forests, and Human Resources, etc. These ministries are the traditional vehicles of government administration; they are under direct executive control and are obviously a part of the Crown.

The second category consists of those regulatory agencies separate from the ministries but not necessarily independent of them. These agencies are established solely for the purpose of regulation. In this category are the various inspectors, directors, commissions and boards. For example, inspectors are appointed under the *Factory Act*,[7] and the *Livestock Disease Control Act*.[8] There is also a multitude of regulatory boards and commissions, such as the Corporate and Financial Services Commission.[9] These agencies and their employees are Crown servants. The regulatory agencies all enjoy the privileges of the Crown. This is important because it is quite possible that their activities or mandates may give rise to monetary claims against private individuals.

The third category of Crown entity consists of those government authorities, often Crown corporations, that are involved in some economic activity or development. Crown corporations are a more recent phenomenon. They often involve the government in activities which were formerly performed by the private sector. Their function is more proprietary than regulatory.[10]

The prime example of such an agency is the British Columbia Ferry Corporation.[11] The Act under which the Corporation is constituted contemplates the undertaking by government of a distinctly proprietary function which at one time had been carried out by private business.[12] This seems to cloak the Corporation with all the special privileges of government. This is true of many proprietary activities carried out by similar Crown corporations.[13] As Crown corporations bring the government directly into the private sector, the possibility of competing interests is increased.

Because a Crown corporation which is an agent of the Crown enjoys the special legal position of the Crown, the question of what is a Crown agent or agency has generated much litigation. To assist in this problem of classification the courts have suggested that the correct legal description of any subordinate of "Her Majesty," whether an individual or a corporation, is the ordinary legal classification of "agent" or "servant" of Her Majesty. The phrase "emanation of the Crown" has also been used[14] but disapproved because it is "inappropriate and undefined" and tends to obscure the question.[15]

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[7] R.S.B.C. 1979, c. 118.

[8] R.S.B.C. 1979, c. 242.

[9] *See Securities Act*, R.S.B.C. 1979, c. 380, s. 2.

[10] In some cases the courts have recognized this distinction as a basis for denying them the special privileges of the Crown. *See, e.g., Baton Broadcasting Ltd.* v. *C.B.C.*, [1966] 2 O.R. 169 (Ont. H.C.).

[11] *See Ferry Corporation Act*, R.S.B.C. 1979, c. 128.

[12] The objects of the Corporation are set out *ibid*. s. 6.

[13] For discussion of the administration and control of Crown corporations *see* Ashley & Smails, *Canadian Crown Corporations* (1965); Watson Sellar, *Government Corporations*, (1946) 24 Can. B. Rev. 394; W. Friedmann, *The New Public Corporations and the Law*, (1947) 10 Mod. L. Rev. 233.

Although it is true the words "agent" and "servant" have known and defined legal attributes, their use has not resolved some of the perplexities of the law. It appears that an "agent" in this context does not include an independent contractor to the Crown who could not claim Crown privileges. Professor Glanville Williams has concluded that "agent" seems to be simply a synonym for "servant."[16]

In deciding whether a particular authority, board, or public corporation is an agent of the Crown the empowering statute may be of assistance. In British Columbia the Legislature has frequently inserted a provision expressly stating that a provincial Crown corporation is an agent of Her Majesty. For example, the legislation constituting the British Columbia Hydro and Power Authority provides:[17]

> The Authority is for all its purposes an agent of Her Majesty the Queen in right of the Province, and its powers may be exercised only as an agent of Her Majesty.

Similar provisions are found in other legislation creating public authorities,[18] including the Act under which the Insurance Corporation of British Columbia is constituted.[19]

The use of the phrase "agent of Her Majesty" is rooted in the early history of the delegation of the Sovereign's executive authority.[20] Thus by so describing a public corporation seems to clothe it with the mantle of the prerogative and remove any doubt about its status before the law.[21]

However, sometimes legislation does not indicate whether an entity is an agent of the Crown. Then the question becomes a matter of more difficult judicial consideration. Such guidelines as there are in this area do not always give clear assistance. As stated by Laidlaw J. A. in *Regina* v. *Ontario Labour Relations Board*:[22]

> It is not possible for me to formulate a comprehensive and accurate test applicable in all cases to determine with certainty whether or not an entity is a Crown agent. The answer to that question depends in part upon the nature of the functions performed and for whose benefit the service is rendered. It depends upon the nature and degree of control exercisable or retained by the Crown.

Although judges have not adopted a single test for determining whether a particular entity is an agent of the Crown, they have undoubtedly been most influenced by the so-called "control test."[23] An example is the decision of the Supreme Court of Canada in *Fidelity Ins. Co. of Can.* v. *Cronkhite Supply*,[24] where it was held, applying the "control test", that the Workers Compensation Board of British Columbia was not a Crown agency. The "test" was also applied in a recent decision of the British Columbia Court of Appeal, where it was held that the Board of Industrial Relations was an agent of the Crown.[25]

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[14] *Gilbert* v. *Trinity House Corp.*, (1886) 17 Q.B. 795 at p. 801.

[15] *Int. Railway Co.* v. *Niagara Parks Commission* [1941] 2 All E.R. 456 at 462 (P.C.).

[16] Glanville Williams, *Crown Proceedings Act, 1947* (1948) 24.

[17] R.S.B.C. 1979, c. 188, s. 3 (1).

[18] Including the *Ferry Corporation Act*, *supra* n. 11, s. 2 (3). *See also Dyking Authority Act*, R.S.B.C. 1979, c. 100, s. 4 (1); *Harbour Board Act*, R.S.B.C. 1979, c. 160, s. 3 (1); *Hospital District Finance Act*, R.S.B.C. 1979, c. 179, s. 1 (6);

[19] *Insurance Corporation Act*, R.S.B.C. 1979, c. 201, s. 12 (2).

[20] Laird, *The Ontario Crown Agency Act*, (1959) 12 U. Tor. L.J. 281.

[21] *But see Food Controller* v. *Cork*, [1923] A.C. 647 (H.L.) *per* Lord Shaw at 666 discussed *infra*.

[22] [1963] 2 O.R. 91 (Ont. C.A.).

[23] *See, e.g., Fidelity Insurance Co. of Canada Ltd.* v. *Cronkhite Supply Ltd.*, (1979) 13 B.C.L.R. 33 (S.C.C.); *Westeel-Rosco Ltd.* v. *South Sask. Hospital Centre Bd. of Governors*, [1977] 2 S.C.R. 238; Mueller, *The Liability of the Ontario Government in Tort*, (1967) 25 U. Tor. Fac. L. Rev. 3, 5; Glanville Williams, *Crown Proceedings Act, 1947* (1948) 23–25.

[24] Ibid.

In applying the control test the courts have relied on a number of factors. Professor Frank Scott has extracted from the cases the following list of criteria used to decide whether a public authority is an agent of the Crown:[26]

> Factors to be considered are whether the Crown appoints the members of the corporation, whether it can levy rates, whether its property is vested in the Crown, whether its funds are received from and must be returned to and audited by the government, whether it has discretionary powers of its own which it can exercise independently without consulting any representative of the Crown, whether the corporation is incorporated as a commercial company under the ordinary company legislation, whether its functions were formerly performed by private enterprises, and so on.

It is clear from these criteria, as applied by the courts, that there is room for a great deal of judicial discretion. Professor Laskin, as he then was, recognized this vagueness in the law on Crown liability and suggested that the courts' view of policy is the most important factor in determining the status in question.[27]

D. Summary

Government involvement of one kind or another in virtually every sphere of economic and social activity means that competing claims between Crown and subject must necessarily arise with greater frequency than in earlier days. That the law should favour the Crown in these circumstances is a matter more controversial today than in years past when the role of the Crown was more narrowly confined.

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[25] *Board of Industrial Relations* v. *Canadian Imperial Bank of Commerce*, (1981) 38 C.B.R. 126.

[26] F. R. Scott, *Administrative Law* 268, 280–4.

[27] *Crown Companies and Civil Liability*, (1944) 22 Can. B. Rev. 927

CHAPTER III

CROWN PRIORITY AT COMMON LAW

A. The Prerogative Generally

The right of the Crown to have its debts paid in priority to other creditors has its origins in a body of common law known as the "royal prerogative."[1] The royal prerogative is part of the common law that attributes to the Sovereign legal powers or characteristics not shared by others. Blackstone described it in the following terms:[2]

> By the word prerogative we usually understand that special pre-eminence which the King hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies . . . something that is required or demanded before, or in preference to, all others.

In more modern times Dicey described it as "the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown."[3]

In early times the prerogative was the fount of almost all governmental powers and extended to such diverse matters as the Sovereign's prior rights to "royal fish,"[4] wrecks, treasure trove, swans and precious metals.[5]

The prerogative exists by virtue of the common law and thus is liable to be restricted or diminished by legislation. The emergence of parliamentary sovereignty significantly reduced the scope of the prerogative. Hence the reference to "residue" in the passage from Dicey quoted above. It has been held that once the exercise of a prerogative has been provided for by legislation, the prerogative is superseded and the statute governs the exercise of the right.[6]

In England, the Queen retains certain prerogatives, the exercise of which is personal. In Canada, the exercise of the residue of the prerogative is in the hands of the Executive arm of government by virtue of a notional delegation.

B. The Prerogative of Prior Payment

One feature of the Royal prerogative is said to be the general proposition that:[7]

> Where the Crown's right and that of a subject meet at one and the same time, that of the Crown is in general preferred . . .

It is from that proposition that the right of the Crown to prior payment is said to flow:[8]

> I do not think there can be a doubt that the Crown is entitled at common law to a preference in a case such as this, for when the rights of the Crown come in conflict with the right of a subject in respect to the payment of debts of equal degree, the right of the Crown must prevail . . .

The use of the words "of equal degree" qualifies the prerogative but a question arises as to their meaning.[9]

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[1] *See generally*, O. Hood Phillips, Constitutional and Administrative Law 228 (5th ed., 1973).

[2] I Bl. Comm. 239.

[3] Dicey, Law of the Constitution 424 (10th ed.).

[4] Whales and sturgeons.

[5] *See generally* 6 Hals. 827 *et seq.* (2nd ed., 1932).

[6] *A.-G. v. DeKeyser's Royal Hotel, Ltd.*, [1920] A.C. 508 (H.L.).

[7] *Supra*, n. 5 at 584.

[8] *The Queen* v. *Bank of Nova Scotia*, (1886) 11 S.C.R. 1, *per* Ritchie C.J. at 10. In addition to the prerogative right to prior payment, the Crown has a prerogative remedy for enforcing that right, namely the writ of extent, *see Food Controller* v. *Cork*, [1923] A.C. 647 (H.L.) per Lord Wrenbury at 669.

[9] This qualification first seems to appear in *Re Henley & Co.*, (1878) 9 Ch. D 469 at 481 (C.A.).

Two possibilities suggest themselves. First, the words may have their origin in the now obsolete distinction between so-called specialty debts (debts of record or created under seal) and ordinary contract debts. This was considered in *Re Henley & Co.*,[10] but no decisive answer emerged. Or secondly the words could mean that secured and unsecured debts are not debts of "equal degree."

The latter suggestion was recently considered by the Nova Scotia Court of Appeal in *MacCulloch & Co.* v. *A.G. of Canada*,[11] where MacKeigan C.J. said:[12]

> I can find no definition of the phrase . . . I conceive the phrase to refer to what we would now call classes of creditors, such as secured creditor, ordinary creditor, etc. McQuaid J.A., in *Hughes*, . . . said:
>
> "If necessary, however, the case at bar is distinguishable inasmuch as in the *Downe* case the Crown was seeking priority of its judgment over a prior registered chattel mortgage and it could be argued that the competition was not between creditors 'of equal degree'."(13)

At issue was whether, on the distribution of the surplus on a first mortgage foreclosure sale, a Federal Crown judgment had priority over judgments and second mortgages registered under the Provincial *Registry Act* prior to the Crown judgment. The Court of Appeal held that the Crown's judgment took priority over the second mortgages and other judgments, recorded before them, on the basis that the claims were of "equal degree."

Following the reference to the *Downe* case, MacKeigan C. J. said:[14]

> Here the creditors are in that sense all of the same class or degree *vis-a-vis* the fund in court. They are not of 'unequal' degree merely because they have different priorities. In any event, they do not cease to be of 'equal degree' merely because of the *Registry Act* priorities. A provincial statute cannot thus indirectly wipe out a federal Crown prerogative right.

On appeal to the Supreme Court of Canada the issue was narrowed to whether the Crown judgment has priority in the distribution of the surplus over a second mortgage registered prior to the Crown judgment. The Supreme Court held that the claim of the second mortgagee was of a higher degree than the subsequently recorded Crown judgment. Speaking for the Court, Ritchie J. said:[15]

> The surplus monies in the hands of the sheriff after the first mortgage foreclosure sale were in my opinion held by him and subsequently by the Accountant General of the Supreme Court of Nova Scotia in trust for the subsequent encumbrancers, and in my view it cannot be said that upon the security represented by the mortgage premises being converted into money at the foreclosure sale, the priority theretofore enjoyed by a second mortgagee of record is automatically diminished so as to accord precedence to a Crown judgment obtained and recorded at a later date. If this be so, then it must follow that the claim of the second mortgagee is of a higher degree than that of the subsequently recorded Crown judgments and as the royal prerogative can only be invoked where the claim of the Crown and the subject are "of equal degree", it can have no application in the present circumstances.

Ritchie, J. also disagreed with MacKeigan C.J.'s conclusion that the claims do not cease to be of "equal degree" because of the *Registry Act* priorities, and said:[16]

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[10] *Ibid.*

[11] (1979) 5 R.P.R. 201.

[12] *Ibid.* at 207.

[13] In a recent Australian case, *Bank of New South Wales* v. *Commissioner of Taxation (Cth)*, (1979) 54 A.L.J.R. 129, an unsecured Crown debt was held to be of a "lesser degree" than a debt to a bank secured by a fixed charge.

[14] *Supra*, n. 11 at 208.

[15] [1980] 1 S.C.R. 423 at 427.

[16] *Ibid.* at 429.

> In my view this . . . overlooks the position at common law which was that the second mortgages here in question representing as they do a part interest in the legal title, took precedence over Crown judgments subsequently obtained and recorded against the mortgagor, owner of the equity of redemption. As I am of opinion that the monies in the hands of the sheriff and subsequently the Accountant General of the Supreme Court of Nova Scotia were subject to the same priorities as those existing at common law before the sale, it follows that I find the mortgagee's claim to be of higher and not of equal degree with that of the Crown, so that in the present case there was no federal Crown prerogative right wiped out by the *Registry Act* or otherwise.

For the question to arise, whether claims are of "equal degree," the claims must coincide in time. In *Giles* v. *Grover*, for example, it was said:[17]

> If, however, the right of the subject be complete and perfect before that of the King commences, it is manifest that the rule does not apply, for there is no point of time at which the two rights are in conflict; nor can there be a question which of the two ought to prevail in a case where one, that of the subject, has prevailed already. But if, whilst the right of the subject is still in progress towards completion, the right of the Crown arises, it seems to me that two rights do come into conflict together at one and the same time, and that the consequence in that case is, that the right of the Crown ought to prevail.(18)

A further qualification to the extent of the prerogative power may develop if modern courts also consider the character of the activity that gives rise to the Crown claim. In *Food Controller* v. *Cork*, in the House of Lords, it was stated:[19]

> My Lords, I venture to interpose much doubt as to the application or extension, . . . "that where the King's and the subject's title concur the King's shall be preferred," . . . to cases of ordinary commercial or industrial contracts entered into by a Government department in the course of the business or enterprise which it carries on. If a special statute confers upon such departments priorities, preferences, excuses for misfeasance or exemptions from liability, then of course the statute controls the situation. But if the propositions above cited should ever be used to justify or widen the royal prerogative by the inclusion of ordinary contracts into the range of privilege, then it is, I think, very important to realize that this dictum . . . occurred in a case in which the nature of the debts, as Crown debts, and that in a very strict sense, was clear beyond all question.

Although technically *obiter dicta*, these views were applied in *R.* v. *W.C.B. and Edmonton*[20] to deny the prerogative to a loan made by an Alberta Treasury Branch.[21] It would be unsafe, however, now to regard this position as settled law.[22]

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[17] *Giles* v. *Grover*, (1832) 9 Bing. 128, 156; 131 E.R. 563, 574 (H.L.).

[18] In a recent Ontario case the prerogative was successfully invoked to give the Federal and Provincial Crown priority over other execution creditors, *Re Marten; Royal Bank of Canada* v. *The Queen*, (1982) 34 O.R. (2d) 399 (Ont. H.C.-Div. Ct.). The *Creditor's Relief Act* of Ontario renders the claims of all execution creditors equal.

[19] *Supra*, n. 8, *per* Lord Shaw at 666.

[20] (1962) 39 W.W.R. 291 (Alta D.C.), *aff'd.* on this point (1963) 42 W.W.R. 226 (Alta S.C.-A.D.).

[21] A "near bank" that functions much like a commercial deposit institution; *see also Alta. Govt. Telephones* v. *Selk*, [1974] 4 W.W.R. 205 (Alta D.C.); *Re Titeley; Alberta Opportunity Company* v. *Cuthbertson*, (1977) 2 Alta. L.R. (2d) 369 (Alta S.C.-T.D.); *Re Bank of Nova Scotia and Hart et al.*, [1981] 1 W.W.R. 552 (Alta Q.B.).

[22] In Australia, for example, it would appear that the issue is now decided against any exception to the rule of priority for business debts, *Re K. L. Tractors*, (1911) 106 C.L.R. 318, 336, as cited in C. McNairn, *Governmental and Intergovernmental Immunity in Australia and Canada*, (1977) 113.

CHAPTER IV

STATUTES IN DEROGATION OF THE PREROGATIVE

A. General

It was pointed out in the previous chapter that the prerogative may be limited, controlled or abolished by statute. In some cases legislation has been enacted which essentially restates the prerogative with respect to a specified class of debts.[1]

In this chapter we examine some ways in which the prerogative right to prior payment has been affected by statute.

The extent to which the prerogative has been affected by statute has been a fruitful source of litigation. In almost every case in which the nature of the prerogative has been considered or expounded the first step has been to determine whether a particular statute has affected the prerogative. The need to consider this issue arises out of another prerogative—the principle that the Crown is not bound by a statute unless named or by necessary implication.

This principle is often enshrined in an interpretation enactment, as was the case in British Columbia until 1974.[2] This aspect of the prerogative was considered in our earlier Report on the Legal Position of the Crown and it was our conclusion that the presumption ought to be reversed so that all statutes are binding on the Crown in the absence of a contrary stipulation.[3] A recommendation to that effect was implemented and subsection 14 (1) of the *Interpretation Act*[4] now provides:

> Unless it specifically provides otherwise, an enactment is binding on Her Majesty.

So far as we are aware this provision is unique in the Commonwealth.

Since section 14 (1) has not yet been the subject of a significant body of case law, its full impact on the prerogative is yet to be ascertained. Nonetheless it may be possible to point to a particular way in which the prerogative right to prior payment now seems to have been limited or extinguished by an enactment which, by virtue of section 14 (1), now binds the Provincial Crown.

B. Priority in Execution Proceedings

The *Creditor Assistance Act*[5] of British Columbia purports to eliminate priorities among execution creditors. The central policy is set out in section 47 of the *Act*:

> There is no priority among execution creditors in the Supreme Court or County Courts.

Thus, where the Provincial Crown seeks to assert its claim through a writ of execution issued from the Supreme Court or a County Court, it would seem that it can not rely on the prerogative to assert a right to priority. On the other hand, it appears that the Federal Crown is able to assert a right of priority.[6]

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[1] These statutes are discussed in Chapter VII, "The Priority of Statutory Crown Liens."

[2] *See Interpretation Act*, R.S.B.C. 1960, c. 199, s. 35.

[3] LRC 9 at 63–67.

[4] R.S.B.C. 1979, c. 206.

[5] R.S.B.C. 1979, c. 80.

[6] *See, e.g.*, the recent Ontario decision *Re Marten; Royal Bank of Canada* v. *The Queen*, (1982) 34 O.R. (2d) 399 (Ont. H.C.-Div. Ct.).

We are told by the Sheriff's Office that, in fact, no priority is now being given to ordinary Provincial Crown claims in execution proceedings.[7]

C. Federal Bankruptcy Legislation

Another body of law that limits the prerogative right to priority of payment is federal legislation relating to insolvency, the most significant enactment being the *Bankruptcy Act*.[8] It has long been accepted that the priorities specified in bankruptcy legislation govern the rights of the Crown and displace the prerogative.

At present the Crown *per se*, while it enjoys a priority over ordinary creditors, is subordinated to a number of other categories of claim. The priorities are set out in section 107 (1) which provides that "claims of the Crown not previously mentioned . . . in the right of Canada or of any province, *pari passu* notwithstanding any statutory preference to the contrary."[9] rank tenth in priority. It is interesting to note that indebtedness arising under workers' compensation legislation, unemployment insurance legislation and the *Income Tax Act* ranks higher in priority.[10] Thus, while claims of the Crown are still preferred to those of ordinary creditors, competing claims are recognized

Further inroads will be made on the priority of the Crown if the new bankruptcy Bill recently introduced becomes law.[11] The Bill creates three classes of creditor; preferred, ordinary, and deferred, whose priority is ranked in that order.[12] Within the first and third class of claim are subclasses which again are ranked in priority with respect to each other.

The only reference to Crown claims is to money collected on behalf of the Crown and held in trust by the bankrupt. This is the lowest ranked subclass of preferred claim.[13] With respect to all other claims, the Crown would participate in the estate as an ordinary creditor.[14]

D. Insolvent Estates of Deceased Persons

The *Estate Administration Act*[15] provides that where the estate of a deceased person is not sufficient for the payment in full of all the deceased's debts and liabilities, the proceeds of the estate are to be applied in a particular order of priority in a scheme of distribution similar to that in the *Bankruptcy Act*.[16] The Crown ranks ahead of ordinary creditors but is subordinated to a number of other categories of claim, ranking eighth in priority.[17] It is, for example, subordinate to claims arising under the *Workers Compensation Act*, *Unemployment Insurance Act* and the *Income Tax Act*.

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[7] Telephone conversation with a member of Sheriff Services Staff, March 14, 1979. It should be noted that in an earlier Report on Creditors' Relief Legislation: A New Approach (LRC 42, 1979), the Commission recommended that the *Creditor Assistance Act* be repealed. The question therefore arises as to whether repeal would revive the prerogative. It is arguable that it would not. Section 35 (a) of the *Interpretation Act* provides:

> Where an enactment is repealed in whole or in part, the repeal does not
>
> (a) revive an enactment or thing not in force or existing immediately before the time when the repeal takes effect;

The word "thing" would seem to be broad enough to preclude a revival of the prerogative. A similar argument was raised in an interesting series of notes that appeared in the Canadian Bar Review in the late 1920's. The prerogative right to prior payment had been abolished in Upper Canada by a pre-confederation statute, 29-30 Vict. c. 43, s. 2. In 1914 that statute was repealed. *See* (1927) 5 Can. B. Rev. 431 and 633; (1928) 6 Can. B. Rev. 159. This argument appears to have been lost sight of as the C.E.D. (Ont.) states unequivocally that the prerogative exists. 8 C.E.D. (Ont.) 40-140 (3rd ed., 1978). For a recent Ontario decision where both the Federal Crown and Provincial Crown successfully invoked the prerogative to gain priority over other execution creditors, *see Re Marten; Royal Bank of Canada* v. *The Queen*, *ibid*.

[8] R.S.C. 1970, c. B-3.

[9] *Ibid*. s. 107 (1) (j).

[10] *Ibid*. s. 107 (1) (h).

[11] In fact 4 successive bills have been introduced. Bill C-60 (May 5, 1975); Bill S-11 (March 21, 1978); Bill S-14 (Feb. 27, 1979); Bill C-12 (April 16, 1980). All references to the new legislation is to the latest version.

[12] Bill C-12, *ibid*. s. 265.

[13] *Ibid*. s. 265 (4) (i).

[14] *Ibid*. s. 265 (5).

[15] R.S.B.C. 1979, c. 114.

[16] *Ibid*. s. 114.

E. Registration Laws

Almost every province has enacted a legislative scheme to provide for the registration of deeds, instruments and assurances respecting interests in or claims to land. In the western provinces this takes the form of Torrens-type land titles legislation in which the registry system, in effect, guarantees title.[18] In other jurisdictions the system acts as a simple repository for instruments.

A feature common to both systems is that priority flows from the registration of an instrument. Usually priority is governed by the order of registration. It is also common to use the registration system as a vehicle for the enforcement of judgments which, through their registration, form something akin to a lien on land.[19] A question that has arisen a number of times is whether a Crown claim that is asserted pursuant to a registration statute is bound by the priorities set out therein.

In British Columbia, it appears that the prerogative right will displace the statutory priority accorded competing creditors that have registered judgments. In *Emerson* v. *Simpson*,[20] it was held that a writ of extent registered by the Crown (Federal), by virtue of the prerogative, had priority over judgments registered at an earlier date notwithstanding the priorities specified by Provincial laws.[21] It seems the result would have been the same if the claim had been by the Crown in the right of the Province. Today, however, it is probable that the Crown Provincial would be precluded from asserting such priority since it is now bound by its own legislation.[22]

F. Summary

It appears that the prerogative right of the Crown to prior payment has suffered significant erosion in recent years and, in the light of federal initiatives in bankruptcy, that trend will continue.

Nonetheless, so long as the prerogative right continues, situations can arise where it may be relied upon to the detriment of competing creditors. An example may be found in *Crowther* v. *Attorney General of Canada*,[23] a 1959 decision of the Nova Scotia Supreme Court.

Crowther was a member of the Canadian armed forces who had been injured in a motor vehicle accident. He recovered a judgment of $9,000 for his injuries and concurrently his employer, the Crown (Federal) recovered a judgment for $11,000 against the tortfeasor for its loss of Crowther's services. Five thousand dollars insurance was available—an amount insufficient to satisfy either claim.The Crown successfully asserted its right to priority. Crowther, the injured party, was left with nothing.

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[17] *Ibid*. s. 114 (1) (h).

[18] *See, e.g., Land Title Act*, R.S.B.C. 1979, c. 219.

[19] *See* Law Reform Commission of British Columbia, Report on Execution Against Land (LRC 40, 1978).

[20] (1962) 38 W.W.R. 466 (B.C.S.C.).

[21] The result may be different if the Crown claim arises out of a statute that specifies certain priorities and the task is one of interpretation rather than the application of the prerogative. *See, e.g., Roadburg* v. *Cedarhurst Properties Ltd.*, (1979) 8 B.C.L.R. 171 (B.C.S.C.) rev'd. on appeal, (1980) 110 D.L.R. (3d) 433 (B.C.C.A.).

[22] *See* discussion at n. 7 *supra*.

[23] (1959) 17 D.L.R. 437 (N.S.S.C. Full Ct.).

Crowther is, admittedly, an extreme case. It may be that now governments would be more sensitive about asserting the prerogative than they were 20 years ago.[24] Yet, the legal framework for another *Crowther* remains intact, and puts in serious question whether the prerogative of prior payment should be continued.

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[24] For a recent case involving the assertion of the prerogative, with equally dubious results, *see MacCulloch & Co.* v. *A.G. Can.*, (1979) 5 R.P.R. 201 (N.S.S.C. App. Div.) and annotation, *ibid.* at 202, this decision was, however, reversed by the Supreme Court, [1980] 1 S.C.R. 423.

CHAPTER V

PRIORITY UNDER STATUTE: AN OVERVIEW

A. Introduction

Statutory priority is not a new phenomenon. One of the first provisions appears in the Magna Carta[1] under the heading "The King's Debtor dying, the King shall be first paid." In fact Crown priority under statute is far more important than at common law. Our research indicates many enactments, by various means, attempt to prefer the Crown's interest over those of its subjects. It is important to note that, from the point of view of the creditor who finds his claim subordinated to that of government, the distinction between statutory and prerogative priority is of no practical consequence. The impact of the priority on him is the same, whatever its source. He will not be comforted by the fact that his interests are subordinated under a theory of legislative sovereignty as opposed to Crown sovereignty.

B. The Techniques of Achieving Crown Priority Under Statute

It is rare to find in a provincial statute a simple statement that a debt owing to the Crown or to a Crown agent is payable in priority to other debts. Presumably this is unnecessary since the prerogative achieves the same result. However, the prerogative only gives the Crown priority over competing debts "of equal degree" and many debts might be described as being of a "higher" degree and have the potential to defeat the prerogative right. Thus, much of the legislation in this area is directed not so much to affirm the prerogative priority as to replace it or supplement it through legal techniques that give the Crown a higher priority than the prerogative would appear to allow. These techniques are explored, in general terms, below.

1. THE TRUST

Under numerous taxation statutes the tax is not collected directly by the Crown. Rather a duty is imposed on businessmen to act as tax collectors on behalf of the Crown and to make regular remissions of money so collected. In many cases this money is impressed by the statute with a trust in favour of the Crown. The *Hotel Room Tax Act*,[2] for example, provides in section 16 (1):

> (1) Where a person collects an amount of tax under this Act
>
> (a) he shall be deemed to hold it in trust for Her Majesty in right of the Province for the payment over of that amount to Her Majesty in the manner and at the time required under this Act and the regulations, and

The effect of the trust is to give the Crown an exclusive right to the money collected, to the extent to which it can be identified, and to property into which it can be traced.

The trust, as a technique for achieving priority, has its limitations. If the tax money collected has been dissipated by the collector and cannot be traced into other property, the position of the Crown is not improved.

In an attempt to avoid these difficulties, section 16 (1) was recently amended by the addition of the following provision:

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[1] 9 Hen. III, c. 18 (1225).

[2] R.S.B.C. 1979, c. 183, as amended by *Finance Statute Amendment Act, 1982*, S.B.C. 1982, c. 10, s. 17.

> (b) the tax collected shall be deemed to be held separate from and form no part of the person's money, assets or estate, whether or not the amount of the tax has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who has collected the amount of the tax under this Act.

As we point out in Chapter VII, the extent to which this provision might help the Crown is uncertain.

The trust is often supplemented by other techniques for achieving a preferred position, the most significant of which is the lien.

2. The Lien

Previously we quoted only part of section 16 of the *Hotel Room Tax Act*; subsection (2) provides:

> (2) The amount of tax that, under this Act,
> (a) is collected and held in trust under subsection (1), or
> (b) is required to be collected and remitted by an operator
>
> constitutes a lien and charge on the entire assets of
> (c) the estate of the trustee under paragraph (a),
> (d) the person required to collect or remit the tax under paragraph (b), and
> (e) the estate of the person required to collect or remit the tax under paragraph (b).

A similar provision is found in many other provincial statutes. The use of the lien is not confined to taxation. The various provisions creating liens in favour of the Provincial Crown, its emanations or other provincial bodies are set out in full in Appendices A and B.

The lien is to third parties, potentially, the most dangerous and disruptive of the techniques employed by the Crown to achieve priority. The effect of creating a lien in favour of the Crown is to give it the right to satisfy its claim out of assets of the debtor that may be totally unrelated to the claim to the exclusion of ordinary creditors. It is analogous to a mortgage. If the legislation also gives the lien priority over other secured interests, the Crown can thereby exclude other creditors who would otherwise enjoy a right of security over the assets in question.

The danger to third party interests is obvious. First, lenders may be misled by the apparent unencumbered ownership of assets by the debtor into extending credit to him. Secondly, such a lender, if more cautious, may wish to take security for his debt. The lender who does so may unexpectedly find his security interest subordinated to a Crown lien. This may occur even if the lien arose after security was taken. Finally, the lien may continue to attach to property in the hands of a *bona fide* purchaser for value from the debtor.

The priority of Crown liens in respect of these competing third party interests is a difficult area of the law, and one that calls for treatment in a separate chapter. For present purposes it is sufficient to say that the law is complex and obscure and badly in need of rationalization.

Similar dangers may also arise with respect to liens or other security interests created consensually by a debtor. These dangers have been minimized, however, by the enactment of legislation that makes the enforceability of such interests dependent upon registration which publicizes them.[3] Such statutes do not extend to Crown liens.

3. Procedural Advantages

In many legal contests priority in right is determined by priority in time. This may be true whether or not one of the contestants is the Crown. When the

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[3] For a general review of these registration laws in relation to personal property and their improvement, *see* Law Reform Commission of British Columbia, Report on Personal Property Security (LRC 23, 1975).

Crown stands on equal footing with its subjects in the race for priority it cannot be said that its interests are preferred. When, however, the Crown enjoys certain procedural advantages denied to its competitors, which result in giving the Crown a headstart in the race, a priority, of sorts, may be said to result.

The form of this "headstart" depends on statutory provisions which allow the Crown to bypass, in whole or in part, the normal litigation process in asserting its claims.

(a) *The Deemed Judgment*

The Act which best illustrates the special advantages enjoyed by the Crown is the *Mining Tax Act*.[4] First, the Crown is given a lien to secure taxes.[5] Then it is given three special procedures to enforce the tax claim.

The first procedure is the "deemed judgment." Section 31 provides:

> Where default is made in the payment of a tax that is due and payable under this Act, or any part of the tax, the commissioner may issue his certificate stating that the tax was assessed, the amount thereof remaining unpaid, including interest and penalties, and the name of the person by whom it is payable, and may file the certificate with a district registrar of the Supreme Court or with the registrar of a County Court. When filed, the certificate is of the same force and effect and all proceedings may be taken on it as if it were a judgment of the court for recovery of a debt of the amount stated in the certificate against the person named in it.

Thus the certificate procedure makes the whole range of measures for execution of a judgment available to the Crown. The registration of a certificate is a simple administrative procedure that can be done very quickly.

Whether or not, at present, this confers any benefit on the Crown, apart from time, depends on the legal nature of the enforcement measures it takes, as this will determine whether the provisions of the *Creditor Assistance Act*[6] are invoked.[7]

(b) *The Demand Notice*

While the certificate procedure puts the whole range of judgment creditors' remedies at the disposal of the Crown, two specific remedies against a taxpayer's assets are given. The first of these is the demand notice. Section 32 of the *Mining Tax Act* provides in part:

> (1) Where the commissioner has knowledge or suspects that a person is or is about to become indebted to a taxpayer, he may demand of that person that the money otherwise payable by him to the taxpayer be in whole or in part paid to the commissioner on account of the taxpayer's liability under this Act.
>
> (2) The receipt of the commissioner for money so paid shall constitute a good and sufficient discharge of the liability of the person to the taxpayer to the extent of the amount referred to in the receipt.
>
> (3) A person discharging a liability to a taxpayer after receipt of a demand under this section is personally liable to the Crown to the extent of the liability discharged as between him and the taxpayer or to the extent of the liability of the taxpayer for taxes and interest, whichever is the lesser amount.

The demand notice is comparable to a garnishing order before judgment and appears to enjoy a similar priority.[8]

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[4] R.S.B.C. 1979, c. 267.

[5] *Ibid.* s. 28.

[6] R.S.B.C. 1979, c. 80.

[7] *See* Law Reform Commission of British Columbia, Report on Creditors' Relief Legislation: A New Approach, Appendix B (LRC 42, 1977). If the *Creditors' Relief Act* is repealed as recommended the certificate procedure could confer an advantage with respect to all enforcement measures.

[8] The Federal Crown, under s. 224 of the *Income Tax Act*, S.C. 1970-71-72, C-63 as amended, has a similar right to serve a demand notice upon persons indebted to the taxpayer, the status of these demand notices was recently considered by the Appellate Division of the Alberta Supreme Court in *Attorney General of Canada* v. *Royal Bank of Canada*, [1979] 1 W.W.R. 479.

(c) *Distress*

The other direct remedy against a debtor's assets provided by statute is a right of distress. Section 43 (1) of the *Corporation Capital Tax Act* provides:

> The Commissioner may, by himself or his agent, levy the amount of the tax that is due and payable, with costs, by distress of the goods and chattels of the corporation liable to pay the tax, or of any goods and chattels in its possession, wherever they may be found in the Province, or of any goods and chattels found on its premises the property of or in the possession of any other occupant of the premises, and that would be subject to distress for arrears of rent due to a landlord. The costs chargeable are those payable as between landlord and tenant.

This is the most extreme of the special remedies, because it ousts the laws of general application with respect to the enforcement of judgments in favour of an aspect of the law governing landlord and tenant relationships.

4. ASSIMILATION TO REAL PROPERTY TAXES

A further technique of enhancing the Crown's position is through the assimilation of its claims to taxes on real property. This is usually employed where the claim is closely associated with or arises out of ownership of land.

For example, under the *Weed Control Act*,[9] where an occupier of property fails to control noxious weeds, appropriate steps to do so may be taken by an inspector under this Act. A statement of the costs incurred by the inspector may then be sent to the local taxing authority and these costs are deemed to be taxes in arrears and are added to the tax roll.[10] The claim therefore takes advantage of the machinery established for the collection of local taxes and enjoys the same high priority. Similar provisions exist with respect to the suppression of fire hazards.[11]

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[9] R.S.B.C. 1979, c. 432.

[10] *Ibid.*, s. 8.

[11] *Fire Services Act*, R.S.B.C. 1979, c. 133, s. 23; *see also Agricultural Land Development Act*, R.S.B.C. 1979, c. 10, s. 2 (1), considered in *Farm Credit Corporation* v. *Brown*, [1980] B.C.D. Civ. 2769-06 (B.C.S.C.).

CHAPTER VI

THE BASIS OF STATUTORY CROWN CLAIMS

A. Introduction

We have examined a large number of statutory preferences that are currently a part of British Columbia law. In the course of that examination certain patterns emerged which enabled us to identify categories of Crown claims which, although they appear in different statutes, serve similar economic or social functions. In developing a rational policy toward priority it is much more convenient to be able to deal with Crown claims as categories rather than on an individual basis. The various categories of claims, as we perceive them, are set out below.

B. Tax Related Claims

1. Claims for Unpaid Taxes

A variety of taxes are imposed under provincial law to raise money to meet the financial needs of government. The events or circumstances that may trigger the imposition of a provincial tax vary. It may be the sale of a specified commodity such as cigarettes[1] or a retail sale of goods generally.[2] It may be the provision of a specified service such as hotel accommodation.[3] A tax may be imposed on financial worth[4] or assets[5] or on income, either generally,[6] or earned through a specified economic activity such as logging[7] or mining.[8]

2. Claims for Taxes Collected on Behalf of the Crown

As we pointed out in a previous chapter, taxation schemes are frequently structured so that the taxpayer does not remit money directly to the Crown. This would be impractical where a tax is levied with respect to a large number of transactions on a large number of taxpayers for relatively small amounts, such as a tax on retail sales. Therefore, taxation statutes often impose a duty on the person with whom the taxpayer deals, such as the retail seller, to collect and remit periodically the tax on behalf of the Crown.[9]

The legal liability of the collector with respect to unremitted money is of a different character from the liability of the taxpayer. The collector's position is comparable to that of an agent.[10]

C. Resource Rents

In British Columbia almost all natural resources are vested in the Crown. These resources are then made available to entrepreneurs, under various statutes, for economic exploitation. Payments are then made to the Crown based on degree of exploitation, often on a unit basis. These payments are variously referred to as royalties, stumpage[11] or resource rents.[12] The last term is often used by economists as a compendious expression for payments of this kind. The prime example of a resource rent is the stumpage payable by the forest industry in respect of timber cut on Crown land. It is directly related to units of production.

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[1] *Tobacco Tax Act*, R.S.B.C. 1979, c. 404.

[2] *Social Service Tax Act*, R.S.B.C. 1979, c. 388.

[3] *Hotel Room Tax Act*, R.S.B.C. 1979, c. 183.

[4] *Corporation Capital Tax Act*, S.B.C. 1979, c. 69.

[5] *Mineral Land Tax Act*, R.S.B.C. 1979, c. 260.

[6] *Income Tax Act*, R.S.B.C. 1979, c. 190.

[7] *Logging Tax Act*, R.S.B.C. 1979, c. 248.

[8] *Mining Tax Act*, R.S.B.C. 1979, c. 267; *Mineral Resource Tax Act*, R.S.B.C. 1979, c. 263.

[9] *See Social Service Tax Act*, *supra* n. 2, s. 6.

[10] Indeed, s. 5 of the *Social Service Tax Act*, *ibid.*, provides that a retailer is deemed to be an agent for the Minister in the collection of the tax.

[11] *See Forest Act*, R.S.B.C. 1979, c. 140, ss. 81–88.

[12] *Ibid.* ss. 89, 90.

A resource rent bears a similarity to the price paid by an entrepreneur for his supply of raw materials. Therein lies the theoretical difference between a resource rent and a tax levied on the profit derived by the entrepreneur from the exploitation of the raw material (although in practice the distinction can become somewhat blurred).

Resource rents are predicated on the notion that the Crown has supplied something of value and, in a sense, is a participant in the economic activity. Taxes, on the other hand, are purely revenue devices designed to fill provincial coffers.

D. Claims by the Crown for the Benefit of Others

Both tax claims and resource rents are levied for the direct or indirect benefit of the government. There are, however, levies made and money collected in the name of the Crown which are actually for the direct and indirect benefit of a specified class of persons for example, workers.

1. Workers Compensation Act[13]

The *Workers Compensation Act* creates an insurance scheme for the benefit of injured workers. The benefits provided by the scheme may take the form of treatment and rehabilitation or direct income-type payments to workers, or both. The scheme is funded through compulsory assessments on employers. The collection of unpaid assessments resembles the collection of unpaid taxes.

2. Employment Standards Act[14]

The *Employment Standards Act* provides in part a scheme under which the Crown assists unpaid workers in collecting wages that are owed to them. An unpaid worker may apply to the Director of Employment Standards for assistance and the Director, upon being satisfied as to the facts, may issue a certificate respecting the unpaid wages. Such certificates are enforced by the Director in the same fashion as a tax levy.[15]

E. Claims for Services Provided by the Crown

Government provides a variety of services to citizens. In some cases the cost of a service is charged directly to the user, in whole or in part, while in other cases the cost of a service is borne by taxpayers generally. Where the user must pay for a service, payment is due immediately upon the Crown rendering the service. Little credit is extended by the Crown.

There are, however, certain types of services that are involuntary, in the sense that they are provided as a matter of course and the user does not have the option to reject them. A Crown claim can arise with respect to the fee for this kind of service.

An example of this is the *Boiler and Pressure Vessel Act*.[16] The Act calls for an annual inspection of all pressure vessels to ensure compliance with safety standards. The *Act* imposes a fee for inspection and procedures for enforcing collection.[17]

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[13] R.S.B.C. 1979, c. 437.

[14] S.B.C. 1980, c. 10.

[15] *Ibid.* s.14.

[16] R.S.B.C. 1979, c. 30.

Another type of service in respect of which a claim can arise is where the debtor has defaulted in performing a statutory duty and the Crown has performed it. For example, the *Forest Act*[18] imposes duties on persons harvesting timber to dispose of slash and snags. Section 119 provides:

> (1) Where slash is not disposed of or snags are not felled as required under this Division
>
> (a) the regional manager may dispose of the slash or fall the snags, and the person who was required to do so shall pay the Crown the costs incurred by the Crown . . .

The *Forest Act* provides special means for the collection of money payable under the Act.[19]

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[17] *Ibid.* ss. 15–21.

[18] *Supra*, n. 11.

[19] *Ibid* s. 141; *see also Mining Regulation Act*, R.S.B.C. 1979, c. 265, s. 11, *Coal Mine Regulation Act*, R.S.B.C. c. 52, s. 14.

CHAPTER VII

THE PRIORITY OF STATUTORY CROWN LIENS

A. Introduction

The previous chapter was by no means exhaustive of the variety of Crown claims that arise under statute. Rather, it concentrated on those claims which enjoy the benefits of priority and enforcement machinery that is not available to claims of ordinary creditors. An attempt was made to group the claims on a functional basis to determine what, if any, priority should be accorded to them.

A preliminary step, however, is an examination of the degree of priority created by specific lien provisions under the existing law. At the outset we should emphasize that any priority of these liens over secured creditors may be affected by the bankruptcy of the debtor. Recent decisions have clarified the position of the Crown claims when a bankruptcy takes place. Indeed, it is now clear that the bankruptcy of a debtor can have a profound effect on the priority of the Crown.

B. The Impact of the Bankruptcy Act

Section 107 (1) of the *Bankruptcy Act*,[1] which sets out the scheme of distribution for "preferred" creditors to be followed in a bankruptcy, provides in part:

> (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:
>
> (j) claims of the Crown not previously mentioned in this section, in right of Canada or of any province, *pari passu* notwithstanding any statutory preference to the contrary.

The Crown thus ranks tenth in the list of preferred creditors. In a recent decision, *Re Bourgault*,[2] the Supreme Court of Canada held that the effect of this section was to put all government debts on an equal footing, and that even those debts or claims secured by a statutory lien were included within this section as preferred claims.[3] Prior to this decision, there was authority in British Columbia that a statutory lien gave the Crown the status of a secured creditor. In *Re Clemenshaw*,[4] for example, the British Columbia Court of Appeal held that even though section 107 of the *Bankruptcy Act* allocated claims by the Workmen's Compensation Board to the eighth class of preferred creditors, a statutory lien in favour of the Board elevated it to the ranks of the secured creditors.[5] In *Re Bourgault*, Pigeon J. referred to *Re Clemenshaw* and disagreed with the construction placed on section 107 (1) in that case.

The British Columbia Court of Appeal has now held, in *Kinross Mortgage Corporation* v. *Bushell*,[6] that *Re Clemenshaw* must be taken to be overruled by the decision of the Supreme Court in *Re Bourgault*, and that in a bankruptcy the lien of the Workers Compensation Board is of no effect.[7]

Prior to the Court of Appeal's decision in *Kinross* v. *Bushell*, Legg J. in the Supreme Court of British Columbia, concluded that as a result of *Re Bourgault*, *Re Clemenshaw* must be taken to be overruled.[8] He therefore held that section 107 (1) (j) deprives the Board of Industrial Relations of the right to rank as a secured creditor by virtue of its lien under the *Payment of Wages Act* (now *Employment Standards Act*). In the result, a crystallized claim of a bank holding an assignment of book debts from a bankrupt took priority over the claim of the Board in respect of wages owing to the bankrupt's employees.

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[1] R.S.C. 1970, c. B-3.

[2] [1980] 1 S.C.R. 35.

[3] *See also*, *Royal Bank of Canada* v. *Minister of Finance*, [1979] 2 W.W.R. 501 (Man. C.A.).

[4] (1962) 40 W.W.R. 199.

[5] *See also*, *Re R.A. Nelson Const. Ltd.*, (1965) 53 W.W.R. 574 (B.C.S.C.).

[6] [1982] 1 W.W.R. 87.

[7] *See also Coopers Lybrand et al.* v. *Workers Compensation Board*, [1981] B.C.D. Civ. 2769-04, a decision of the Court of Appeal rendered on the same day, the basis of the judgment being identical.

[8] *Board of Industrial Relations* v. *Canadian Imperial Bank of Commerce*, (1980) 116 D.L.R. (3d) 71.

The decision was upheld on appeal[9] where the Board of Industrial Relations contended that it was not an agent of the Crown and should therefore be regarded as a secured creditor. Anderson J.A. after a detailed examination of the Board's status, composition, powers and duties concluded:[10]

> . . . that the Board is an agent of the Crown and, that, therefore, the learned trial judge was correct in holding that the Board is not a "secured creditor" within the meaning of section 107 (1) of the *Bankruptcy Act*. In my view, we are bound by the judgment of Pigeon, J. in *Re Bourgault* [1980] 1 S.C.R. 35, where he held that claims of the Crown similar to those sought to be made by the Board in the case on appeal were not claims of a "secured creditor" but were claims falling within section 107 (1) (j) of the *Bankruptcy Act*.(11)

Under the proposed *Bankruptcy Act*,[12] the priority of certain Crown liens is dealt with specifically. Section 270 provides:

> (1) Where an arrangement or a bankruptcy order is made in respect of a debtor, any security interest to secure
>
> (a) the payment of a tax claim,
> (b) contributions to social security plans, or
> (c) the payment of a claim of a public utility for the provision of its services,
>
> is void unless the security interest has been registered in fact before the date of filing a petition or arrangement in respect of the debtor and not only deemed to be registered, pursuant to a general system of registration of security interests that is available not only to Her Majesty in right of Canada or of a province but also to every other creditor holding a security interest and that is open to the public for inspection.

Thus only those security interests (liens) which have been perfected by registration will qualify the Crown as a secured creditor. Furthermore, as the system of registration is to be available to all secured creditors and is to be open to public inspection, the Crown, if it is to enjoy any priority, will have to be empowered and obliged to register under existing land registry or personal property security systems. As one commentator has pointed out this will preclude the establishment of a "Crown liens registration office."[13]

Bankruptcy can therefore reduce the effectiveness of particular Crown liens. In consequence, creditors may, in the future, be more willing to press a debtor into bankruptcy in order to defeat the Crown's priority. Indeed, in a recent decision,[14] it was held that it was quite proper for a creditor to seek an order for bankruptcy to give it priority over certain statutory claims. This development could lead to a lesser amount being available for distribution to all creditors because of the costs involved in the administration of a bankrupt's estate.

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[9] (1981) 38 C.B.R. (N.S.) 126 (B.C.C.A.).

[10] *Ibid.* at 141.

[11] *See also Roynat Ltd.* v. *Kandanos Restaurant Ltd.*, (1980) 37 C.B.R. 131 (N.S.) (B.C.S.C.), where it was also held that a debenture holder as a secured creditor took priority over the Provincial Crown's claim for social services tax and the Federal Crown's claim under the *Canada Pension Act* and *Unemployment Insurance Act; and see Re Reed; Franco* v. *Sous-Ministre du Revenu du Quebec*, (1980) 35 C.B.R. (N.S.) 149 (Que. S.C.); *Royal Bank of Canada* v. *Midway Video Industries Ltd.*, (1979) 28 C.B.R. (N.S.) 297 (Man. Q.B.); *Re Black Forest Restaurant Limited*, (1981) 37 C.B.R. (N.S.) 176 (N.S.S.C.); *Director of Labour Standards of Nova Scotia* v. *Trustee in Bankruptcy*, (1981) 38 C.B.R. (N.S.) 253 (N.S.C.A.); *c.f. In the Matter of the Bankruptcy of Gordon Racknagel*, (1982) 42 C.B.R. 155 (B.C.S.C.).

[12] Bill C-12, April 16, 1980.

[13] R. G. Marantz et al., The Proposed Bankruptcy Act, 1978 [Bill S-11] with Commentary, (1978).

[14] *Re: Bankruptcy of Black Bros. (1978) Ltd.*, [1982] B.C.D. Civ. 534-02 (B.C.S.C.).

C. Specific Lien Provisions

1. TAX RELATED CLAIMS

(a) *Claims for Unpaid Taxes*

Section 38 of the *Corporation Capital Tax Act*[15] provides:

> **38.** (1) The tax imposed or assessed under this Act is a lien and charge in favour of the Crown on the entire assets of the corporation, or the entire assets of the corporation in the hands of a trustee, and has priority over all other claims of every person except claims secured by registered liens, charges or encumbrances.
>
> (2) The liens and charges created by this section and their priority are not lost or impaired by any neglect, omission or error of the commissioner, or of any agent or officer, or by taking or failure to take proceedings to recover the tax, or by the tender or acceptance of any partial payment of the tax, or by want of registration.

Almost identical language is used in the *Insurance Premium Tax Act*,[16] and *Mineral Resource Tax Act*,[17] and until recently in the *Mining Tax Act*[18] and *Logging Tax Act*,[19] but with one minor variation:[20]

> **29.** (1) A tax imposed or assessed under this Act forms a lien and charge in favour of the Crown on the entire assets of the taxpayer's estate in the hands of any trustee, and has priority over all other claims except claims secured by registered liens, charges or encumbrances.

Under the *Finance Statute Amendment Act, 1981*[21] the relevant provisions in the *Mining Tax Act* and *Logging Tax Act* were amended by adding "of the taxpayer or" after "entire assets."

The distinction is that the provision first quoted above creates a lien on assets generally and on assets in the hands of a trustee, while the other appears on its face to be restricted to assets in the hands of a trustee.[22] These recent amendments to the *Logging Tax Act* and *Mining Tax Act* would appear to have widened the scope of the liens under those Acts.

The reference to "trustee" suggests that a primary concern is to ensure priority in the administration of the taxpayer's estate if he should die or become bankrupt leaving taxes unpaid. If this was the case then its efficacy in relation to bankruptcy is doubtful in the light of the decision in *Re Bourgault* and the proposed new *Bankruptcy Act*.

The provisions quoted above purport to give priority over all interests except those "secured by registered liens, charges, or encumbrances." This exception, however, contains no reference to the time at which the competing secured interest must have been registered. It could therefore be argued that any registered charge, whenever created, takes priority over the Crown lien. In a recent decision of the Court of Appeal, *Roadburg* v. *Cedarhurst Properties*,[23] it was held that the lien created by section 38 of the *Corporation Capital Tax Act*[24] arises and attaches when the liability arises, that is at the end of the fiscal year of the corporation, and that it ranks subsequent to claims then secured by liens, charges and encumbrances registered at that time, but that the lien ranks ahead of all other claims, liens, charges and encumbrances. In this case the Crown claimed liens for corporation capital tax payable with respect to the 1976, 1977 and 1978 fiscal years of the respondent corporation. At issue was the priority of various encumbrances, including the liens, as against funds realized from the sale of land approved in foreclosure proceedings by an Order dated May 24, 1978.

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[15] R.S.B.C. 1979, c. 69.

[16] R.S.B.C. 1979, c. 205, s. 19.

[17] R.S.B.C. 1979, c. 263, s. 29.

[18] R.S.B.C. 1979, c. 267, s. 28.

[19] R.S.B.C. 1979, c. 248, s. 28.

[20] *Supra*, n. 16.

[21] S.B.C. 1981, c. 5, ss. 36, 39.

[22] *The Queen in Right of B.C.* v. *Lega Fabricating Ltd.*, (1980) 29 B.C.L.R. 161 (C.A.).

[23] (1980) 110 D.L.R. (3d) 433 (B.C.C.A.).

[24] *Supra*, n. 15.

Lambert J.A. determined the priority question as follows:[25]

> Subsection (1), taken alone, says only that the lien has priority over all other claims except claims secured by registered liens, charges or encumbrances. The ambiguity arises as to whether the exception relates, on the one hand, to all registered liens, charges or encumbrances, whether registered before or after the Crown lien arises and attaches, or whether the exception relates, on the other hand, only to the liens, charges or encumbrances that are registered before the Crown lien arises and attaches.
>
> In my opinion that ambiguity is completely resolved by s-s. (2) of s. 37. That subsection provides expressly that the priority of a lien in favour of the Crown is not impaired by want of registration. If, after the lien attached, it attained a certain priority, and, thereafter, other charges were registered that came to rank ahead of the Crown lien, and so to affect the priority of the Crown lien, then it is my opinion that the priority of the Crown lien would have been impaired by want of registration.
>
> Accordingly, it is my opinion that, when the Crown lien arises and attaches, it ranks subsequent in priority to claims then secured by liens, charges and encumbrances that are registered at that time, and that it ranks ahead of all other claims, liens, charges and encumbrances.

With regard to the question as to where the Crown liens ranked among the creditors who had registered judgments against the debtor's land, Lambert J.A., after considering the relevant sections in the *Land Registry Act*[26] and the *Execution Act,*[27] further held:[28]

> The question of the ranking of the three Crown liens in the list of judgment creditors is, in my opinion, straightforward. [Section 38 (2)] of the *Corporation Capital Tax Act* provides that the priority of the Crown liens is not impaired by want of registration. They should, therefore, be regarded as if registration had occurred on the date when they arose and attached. They should rank among the judgment creditors as if applications for registration of the Crown liens as registered judgments had been made on those dates.

As Mr. Justice Lambert pointed out these issues fell to be determined under real property and execution legislation in effect in 1977 and 1978 and not under legislation enacted in 1978, which came into effect on October, 31, 1979.[29] In 1978 the *Land Registry Act* was repealed and replaced by a new *Land Titles Act,*[30] and part of the *Execution Act* was amended.[31] The major innovation in this legislation, insofar as it dealt with the registration of judgments, was to provide for the registration of a judgment directly against the title of property owned by the judgment debtor in the same manner as any charge.[32] This means that the indices of judgments in the various land registry offices will be eliminated. Apart from this innovation those sections of the *Land Registry Act* and the *Execution Act* considered in *Roadburg* have been re-enacted in substantially the same form and are now contained in the current *Land Title Act*[33] and *Court Order Enforcement Act*.[34] It is therefore probably safe to say that the decision in *Roadburg* would not be affected by the legislation enacted in 1978.

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[25] *Supra*, n. 23 at 446.

[26] R.S.B.C. 1960, c. 208, ss. 2 (1), 43.

[27] R.S.B.C. 1960, c. 135, s. 35.

[28] *Supra*, n. 23 at 449.

[29] *Ibid.* at 436.

[30] S.B.C. 1978, c. 25, s. 321.

[31] S.B.C. 1978, c. 19; For an overview of the various real property statutes enacted in 1978, *see* J. Victor DiCastri, *The Real Property Statutes*, (1978) 35 Advocate, 405.

[32] S.B.C. 1978, c. 19, ss. 37B and 37C.

[33] R.S.B.C. 1979, c. 219, s. 28.

[34] R.S.B.C. 1979, c. 75, s. 79 (2).

(b) *Claims for Taxes Collected on Behalf of the Crown*

Section 18 of the *Social Services Tax Act*[35] provides:

> **18.** (1) Where a person collects an amount of tax under this Act
> (a) he shall be deemed to hold it in trust for Her Majesty in right of the Province for the payment over of that amount to Her Majesty in the manner and at the time required under this Act and regulations, and
> (b) the tax collected shall be deemed to be held separate from and form no part of the person's money, assets or estate, whether or not the amount of the tax has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who collected the amount of the tax under this Act.
>
> (1.1) Where a vendor or lessor sells or leases tangible personal property, any money received by him in respect of the sale or lease, up to the full amount of the tax owing, shall be deemed to be payment of the tax owing by the purchaser or lessee under this Act, and
>
> (2) The amount of taxes that, under this Act,
> (a) is collected and held in trust in accordance with subsection (1); or
> (b) is required to be collected and remitted by a vendor or lessor
> forms a lien and charge on the entire assets of
> (c) the estate of the trustee under paragraph (a);
> (d) the person required to collect or remit the tax under paragraph (b); or
> (e) the estate of the person required to collect or remit the tax under paragraph (d).
>
> (3) The lien and charge created under subsection (2) has priority over all other claims other than a lien under section 15 of the *Employment Standards Act*.

A similar provision is contained in the *Hotel Room Tax Act*,[36] except that the lien is not specifically subordinated to a lien under section 15 of the *Employment Standards Act*. Section 18 (1) (b) was added in 1982,[37] as was a similar addition to the *Hotel Room Tax Act*.[38] Prior to these amendments the relevant sections provided only that the tax collected shall be "deemed" to be held in trust. It is implicit from a recent decision[39] that it is irrelevant whether or not a trust is "deemed" to be created under the *Social Service Tax Act*, and similar statutes. The court said that whether or not a trust exists must be determined by the ordinary rules of law and equity, and is not dependant on the wording of the statute. In the result, it was held that the manner in which tax was collected on behalf of the Crown created a "true" trust which gave the Crown a right to the amount collected provided it could be traced. This case and issue is examined in greater detail in the following chapter.

It seems clear that the recent amendments to the *Social Service Tax Act* and *Hotel Room Tax Act* will not give the Crown any advantage in the case of bankruptcy.[40] It is arguable, however, that they will improve the Crown's position in insolvencies not amounting to a bankruptcy as they might obviate the necessity for the Crown to follow the rules as to tracing in order to recover the amount owing.[41]

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[35] R.S.B.C. 1979, c. 388, as amended by *Employment Standards Act*, S.B.C. 1980, c. 10, s. 119, and *Social Service Tax Amendment Act, 1982*, Bill 30, section 7.

[36] R.S.B.C. 1979, c. 183, s. 16, as amended by *Finance Statutes Amendment Act, 1981*, c. 5, s. 32 and *Finance Statutes Amendment Act, 1982*, S.B.C. 1982, c. 10, s. 17.

[37] *Supra*, n. 35.

[38] *Supra*, n. 36.

[39] *Coopers & Lybrand v. R. in right of Canada*, (1981) 39 C.B.R. 247.

[40] *Ibid.*

[41] *See, e.g., Dauphin Plains Credit Union v. Xyloid Industries*, [1980] 1 S.C.R. 1182; *see also Gatsby Enterprises (Kelowna) Ltd. v. Gatsby Kelowna (1976) Ltd.*, (1978) 30 C.B.R. (N.S.) 1 (B.C.S.C.) *Davis v. Worker's Compensation Board (Alberta)*, (1980) 10 B.L.R. 59 (Alta Q.B.) and *Re Alduco Mechanical Contractors Ltd.*, (1982) 134 D.L.R. (3d) 104.

A statutory trust supplemented by a lien is also contained in the *Tobacco Tax Act*,[42] whereas under the *Gasoline (Coloured) Tax Act*[43] and the *Horse Racing Tax Act*,[44] a trust is merely created in respect of amounts collected under those Acts.

The lien created by these provisions is given priority over "all other claims" and attaches to the entire assets of the person responsible for collecting the tax. It has been held that the words "all other claims" do not include a claim under a mortgage registered prior to the lien arising, on the basis that the legal estate does not form part of the estate of the mortgagor and that the only asset of the mortgagor in the property charged is the equity of redemption.[45] The lien arises and attaches the moment the tax becomes due and payable,[46] and its validity does not depend on the registration of a certificate in the appropriate court registry under section 21 of the Act.[47]

Similar provisions also appear in the taxing statutes of other provinces and Canada, and in recent years there have been a number of often conflicting decisions as to the priorities they create.[48] In a recent decision of the Manitoba Court of Appeal,[49] Monnin J. A. stated:[50]

> We are here concerned with another example of the new and recent type of complex case appearing before the various Courts because provincial Governments are legislating in what is deemed to be a trust with a proliferation of liens which is also associated with this type of legislation.

He went on to point out that the effect of section 107 of the *Bankruptcy Act* has dwindled as a result of this "deemed to be a trust" legislation. He then made a call for reform at the provincial level "to establish true and proper priorities in cases of receivership or other insolvencies not falling under the *Bankruptcy Act*."[51]

The dwindling effect of section 107 of the *Bankruptcy Act* in the face of these deemed trust provisions was noted in The Report of the Study Committee on Bankruptcy and Insolvency Legislation in Canada.[52] In the report it was pointed out that such deemed trusts are really legal fictions, and it was recommended that their use to circumvent the scheme of distribution in the *Bankruptcy Act* should be curtailed.[53] This recommendation is adopted in section 270 (2) of the proposed *Bankruptcy Act*[54] which provides:

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[42] R.S.B.C. 1979, c. 404, s. 15.

[43] R.S.B.C. 1979, c. 151, s. 32 (1).

[44] R.S.B.C. 1979, c. 175, s. 3.

[45] *North West Trust Company* v. *Christiana Inn (1974) Ltd.*, [1976] 4 W.W.R. 622 (B.C.S.C.); *Gatsby Enterprises (Kelowna) Ltd.* v. *Gatsby Kelowna (1976) Ltd.*, *supra*, n. 41.

[46] *Re Campbell River Honda Cars*, (1980) 17 B.C.L.R. 234 (B.C.S.C.). Thus the lien has priority over distress levied by a landlord subsequent to collection of taxes, *The Queen in Right of British Columbia* v. *Trident Building Products Ltd.*, (1982) 132 D.L.R. (3d) 126 (B.C.S.C.).

[47] *Ibid.*

[48] Compare *Moore* v. *The Queen*, (1957) 15 D.L.R. (2d) 681 (N.B.S.C.-A.D.); *Re Ogden Enterprises Ltd.*, (1978) 39 A.P.R. 344 (N.B.S.C.-Q.B.D.); *Re KRA Restaurants Ltd. and Toronto Dominion Bank*, (1977) 74 D.L.R. (3d) 272 (N.S.S.C.), *Bank of Nova Scotia* v. *Noseworthy*, (1975) 8 A.P.R. 203 (Nfld. S.C.); *Royal Bank of Canada* v. *Minister of Finance*, *supra*, n. 3; *and see* David E. Baird, Q.C., *Statutory Trust Liens—Priority over Claims of Secured Creditors*. (1978) 25 C.B.R. (N.S.) 261.

[49] *Re Showcase Realty*, (1979) 96 D.L.R (3d) 58 (Man. C.A.).

[50] *Ibid.* at 60.

[51] *Ibid.* at 61. Monnin J.A. also expressed concern about the effect of these provisions on the ability of a Receiver/Manager to collect his fees. He stated at 64:

> He [the Receiver/Manager] must rank behind the various trust funds, but ahead of the bank, since the receiver/manager cannot participate in the assets which are deemed to be trust funds and never formed part of the assets of Showcase. Some day this will create a serious problem if the various legislatures continue to create these "deemed to be trusts". Eventually in some case there will be no assets available to pay the costs and disbursements to the receiver/manager duly appointed to gather in these various assets and non-assets.

[52] Government of Canada Publication (1970).

[53] *Ibid.* at 113; Another critic of these deemed trust provisions has labelled them "a fascinating example of legislative legerdemain," *see* Marvin A. Catzman, *Employment Claims in Bankruptcy*, (1976) 22 C.B.R. 97, 103-104.

[54] *Supra*, n. 12.

> (2) Where an arrangement or a bankruptcy order is made in respect of a debtor, any trust deemed to have been created by an Act of Parliament or of the legislature of a province to secure
>
> (a) the payment of a tax claim,
> (b) contributions to social security plans, or
> (c) the payment of a claim of a public utility for the provision of its services,
>
> is void unless a trust has been created in fact and the moneys collected to secure the payment or the contributions have been held separate and apart from moneys of the debtor.

To the extent that money is actually held in trust on behalf of the Crown, the proposed Act provides that in respect of this money, the Crown will rank as a preferred creditor.[55]

The major impact of this provision will be upon the claims under the *Social Service Tax Act* and other provincial statutes creating "deemed" trusts and on claims by the Federal Crown for sums withheld from the wages of employees under the *Income Tax Act*,[56] the *Canada Pension Act*,[57] and the *Unemployment Insurance Act*.[58] Each of these Acts imposes a trust over the amounts withheld. Under the *Income Tax Act*,[59] any amount deducted is deemed to be held in trust for the Crown. If, however, no money is actually set aside, it has been held that there is nothing to which the trust could be affixed.[60] By contrast, the *Canada Pension Plan Act*[61] and *Unemployment Insurance Act*[62] provide that an amount equal to the amount withheld shall, in the event of any liquidation assignment or bankruptcy, be deemed to be separate from and form no part of the estate in liquidation, whether or not that amount has in fact been kept separate. These particular provisions will be repealed by the proposed new *Bankruptcy Act*.[63]

(c) *Resource Rents*

Section 141 of the *Forest Act*[64] provides:

> **141.** (1) Money that is required to be paid to the Crown under this or the former Act or under an agreement made under this Act or the former Act
>
> (a) is due and payable by the date specified for payment in a statement to, or notice served on, the person who is required to pay it;
> (b) bears interest as prescribed;
> (c) may be recovered in a court as a debt due to the Crown; and
> (d) constitutes, in favour of the Crown,
>   (i) a lien on timber, lumber, veneer, plywood, pulp, newsprint, special forest products and wood residue owned by the person who owes the money; and
>   (ii) a lien on chattels or an interest in them, other than chattels referred to in subparagraph (i), owned by the person who owes the money.
>
> (2) A lien under subsection (1)(d)(i) has priority over all other claims, and a lien under subsection (1)(d)(ii) has priority over all other claims other than claims secured by liens, charges and encumbrances registered against the chattels before the money is due and payable.
>
> (3) A lien constituted under subsection (1) is not lost or impaired by reason only that
>
> (a) proceedings to recover the money are taken or not;
> (b) partial payment of the money is tendered or accepted; or
> (c) the lien is not registered.

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[55] *Ibid.*
[56] *S.C. 1970-71-72*, c. 63.
[57] *R.S.C. 1970*, c. *C-5*.
[58] *S.C. 1970-71-72*, c. 48.
[59] *Supra*, n. 56, s. 227 (4).
[60] *Supra*, n. 41.
[61] *Supra*, n. 57, § 24 (3) and (4).
[62] *Supra*, n. 58, § 71 (2) and (3).
[63] *Supra*, n. 12.
[64] R.S.B.C. 1979, c. 140.

> (4) Where default is made in the payment of all or part of the money due and payable the minister may issue a certificate stating
>
> (a) the amount that remains unpaid, including interest; and
>
> (b) the name of the person who is required to pay it and may file the certificate with a court having jurisdiction.
>
> (5) A certificate filed under subsection (4) has the same effect as an order of the court for the recovery of a debt in the amount stated in the certificate against the person named in it, and all proceedings may be taken as if it were an order of the court.

Almost identical language is used in section 29 of the *Coal Act*,[65] which gives the Crown a lien in respect of royalty money payable to the Crown.

Under the *Forest Act*, the lien attaches to all the timber and timber products owned by the debtor and has priority over all other claims. The lien also attaches to all the chattels owned by the debtor, but in this respect it does not have priority over other claims that have been secured by "liens, charges and encumbrances" registered against the chattels before the money is due and payable. The lien does not attach to the real property of the debtor.

Again, as with so many Crown liens, the liens are not affected by want of registration.

2. CLAIMS BY THE CROWN FOR THE BENEFIT OF OTHERS

(a) *Employment Standards Act*

The *Employment Standards Act*[66] seeks to protect employees in every industry, business, trade and occupation (subject to specified exceptions) in respect of the payment of their wages. Sections 12 to 15 provide:

> *Certificate of nonpayment by employer*
>
> 12. Where
>
> (a) the director or his authorized representative receives or obtains information before the expiration of 6 months following the latest date on which an employer or person failed to make
>
>   (i) payment of wages to an employee, or
>
>   (ii) a payment referred to in section 9, 17 (1), 19, 20, 23, or 76 (2)
>
> and
>
> (b) the director is satisfied that wages are owing and no other proceeding for their recovery has been commenced, or, if commenced, has been discontinued,
>
> the director shall
>
> (c) issue a certificate setting out the amount owing by the obligor, and
>
> (d) serve a copy of the certificate on the obligor giving him 8 days after service, or further time the director may allow, within which to give notice to the director that he contests the certificate.
>
> *Confirmation of certificate*
>
> 13. (1) Where the obligor does not give notice that he contests the certificate within the time allowed in section 12 (d), the director may confirm the certificate.
>
> (2) Where an obligor, within the time allowed under section 12 (d), gives notice that he contests the certificate, the director shall refer the certificate to the board.
>
> (3) Notwithstanding subsection (2), where an agreement satisfactory to the director has been reached between the obligor and employee or person owed wages named in the certificate, the director may
>
> (a) cancel the certificate, or
>
> (b) cancel the certificate and make and confirm a certificate setting out the amounts agreed to.

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[65] R.S.B.C. 1979, c. 51.

[66] S.B.C. 1980, c. 10.

> (4) Where the director has referred a certificate to the board, the board may, subject to section 91, order the director to
>
> (a) confirm the certificate,
> (b) cancel the certificate, or
> (c) cancel the certificate and make and confirm a certificate setting out the amounts owing.
>
> (5) Where the board makes an order for the payment of money otherwise than under this section, the director shall issue a certificate for that amount and confirm it.
>
> *Certificate enforceable as judgment*
>
> 14. (1) The director may file in court a certificate confirmed under section 13.
>
> (2) A filed certificate is enforceable in the same manner as a judgment of the court in favour of the director for the recovery of a debt in the amount set out in the certificate.
>
> *Lien and charge on property*
>
> 15. (1) Unpaid wages set out in a certificate constitute a lien, charge and secured debt in favour of the director against all the real and personal property of the obligor, including money due or accruing due to the obligor from any source.
>
> (2) Notwithstanding any other Act, the amount of a lien and charge and secured debt referred to in subsection (1) is payable and enforceable in priority over all liens, judgments, charges or any other claims or rights including those of the Crown in right of the Province and, without limiting the generality of the foregoing, the amount has priority over
>
> (a) an assignment, including an assignment of book debts, whether absolute or otherwise and whether crystallized or not,
> (b) a mortgage of personal property,
> (c) a debenture charging personal property, whether crystallized or not, and
> (d) a contract, account receivable, insurance claim or proceeds of a sale of goods,
>
> whether made or created before or after the date the wages were earned or the date a payment for the benefit of an employee became due.
>
> (3) Notwithstanding subsection (2), the lien, charge and secured debt referred to in subsection (1) does not have priority over a mortgage of, or debenture charging, land, that was registered in a land title office before registration against that property of a certificate of judgment obtained pursuant to the filing under section 14, except with respect to money advanced under the mortgage or debenture after the certificate of judgment was registered.

Section 15 (3) states expressly that the lien does not have priority over a mortgage or debenture charging land that is registered prior to the registration of a certificate of non-payment. This provision was absent in the forerunner to this section and, in consequence, a number of cases came before the courts in which the priority of such liens as against mortgagees was in issue. The forerunner to section 15 was section 5A of the *Payment of Wages Act*,[67] which was carried forward in the 1979 Revised Statutes of British Columbia as section 114 of the *Employment Standards Act*.[68] Section 114 provided:

> **114.** (1) Notwithstanding any other Act, or any other Part of this Act, the amount of wages set forth in a certificate issued under section 113 constitutes a lien and charge in favour of the board payable in priority over any other claim or right, including those of the Crown in right of the Province, and, without limiting the generality of the foregoing, that priority shall extend over every assignment, including an assignment of book debts, whether absolute or otherwise, every mortgage of real or personal property and every debenture.

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[67] S.B.C. 1962, c. 45.
[68] R.S.B.C. 1979, c. 107.

> (2) A certificate issued under section 113 shall constitute a lien and charge under subsection (1) from the date wages were earned, and shall extend to all money due from any source to the employer named in the certificate, including money due or accruing due from any contract, account receivable and insurance claim.
>
> (3) Subsections (1) and (2) shall apply to every certificate issued under section 113, whether issued before or after this section comes into force.

It was originally held that although the lien created by these provisions arose on the date the wages were earned, it was payable in priority over a mortgage of real[69] or personal property[70] created and registered before that date. In the result, mortgagees who believed that they had a first charge on a person's land found that they could lose all or part of their security. The difficulties were eventually considered by the Court of Appeal in *Homeplan Realty Ltd.* v. *Avco Financial Services Realty Ltd.*,[71] where Robertson J.A. in a forthright judgment, Taggart J.A. concurring, stated:[72]

> To my mind the result . . . is repugnant. I shall give two examples of what such an interpretation of the Act, if it is correct, can lead to, the first being in effect the actual case at bar:
>
> (1) A borrows a sum of money from B on the security of a mortgage on land owned by A. Thereafter A becomes indebted to his employees C, D and E for wages. In respect of those wages the Board issues a certificate. The land is sold and the proceeds are less than the certified wages. The entire proceeds go to pay C, D and E; there is nothing left for B. It is a simple case of robbing B to pay C, D and E: the interest of B in the land is confiscated and given to C, D and E, and this notwithstanding that B has had nothing whatever to do with the relations of A with his employees. B is a completely innocent third party, yet he is despoiled of his money.
>
> (2) A is an employer. He becomes heavily indebted to employees and is greatly concerned that he cannot pay them, for all that he has is a few hundred dollars in cash. A looks about for a heavily mortgaged property and finds that X owns a piece of land on which Y has a mortgage on which there is owing more than the land is worth, and that X has given up hope of being able to save his land. A goes to X and offers him a few hundred dollars for his equity in the land. X is delighted to save something out of his wreck and conveys the land, subject to Y's mortgage, to A. A then alerts the Board, the Board makes a certificate and brings the land to sale and the Board (for the benefit of A's employees) is paid off out of moneys that should have gone to Y, who had never even heard of A or his employees.
>
> If the Legislative Assembly intends to produce by statute results that are so brutal and piratical, it has the power to do so, but the Courts will hold that that was its intention only if the language of the statute compels that interpretation.

After examining the language of the statute, however, he held that subsection (2) gave the lien priority only over mortgages registered after the date on which the wages were earned. It did not, therefore, take priority over a mortgage registered prior to that date.

The decision of the Court of Appeal was subsequently affirmed by the Supreme Court of Canada[73] where Martland J. said:[74]

> I agree with the Court of Appeal that this view is supported by subs. (2) of s. 5A which was added to the statute in 1973 and which provides that a certificate issued under s. 5 shall constitute a lien and charge under subs. (1) from the date the wages were earned. From that date, the lien attaches to the employer's

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[69] *Homeplan Realty Ltd.* v. *Goodine, Avco et al.*, unreported, August 3, 1976, Prince George Registry No. B6/75 (B.C.S.C.); *Credit Foncier Franco-Canadien* v. *Burridge*, (1978) 4 B.C.L.R. 397 (B.C.S.C.); *Board of Industrial Relations* v. *East Chilliwack Credit Union*, (1977) 2 B.C.L.R. 238 (B.C.S.C.).

[70] *Henfrey* v. *Board of Industrial Relations*, [1976] 4 W.W.R. 427 (B.C.S.C.).

[71] (1978) 81 D.L.R. (3d) 289.

[71] *Ibid.* at 291.

[73] [1979] 2 S.C.R. 699.

[74] *Ibid.* at 706.

> property and, as provided in subs. (1), it will take priority over any other claim, including an assignment or mortgage. In other words, after the lien attaches, its priority is unaffected by a disposition of his property made by the employer. Where a mortgage has been made prior to the lien attaching, it is not affected. The lien will only attach to the employer's equity in that property.

Section 15 (3) of the current *Employment Standards Act*[75] affords a mortgagee of real property protection greater than that provided by the Supreme Court of Canada in the *Homeplan* case. The priority of the lien now dates from the date that the "certificate of judgment" is registered in the land title office, and not from the date that the wages are earned. In the result, a potential mortgagee of real property can rely upon a search of the land title office to reveal any lien that would rank prior to his mortgage.

While section 15 of the current Act protects the priority of mortgagees of real property, the priority of holders of other security interests are not so protected, and in some cases they would appear to be in a worse position than under the former law. Section 15 (2) now provides that the lien has priority over "all liens, judgments, charges . . . whether made or created before or after the date the wages were earned." The *Homeplan* case had established that the former provisions did not give the lien priority over charges registered prior to the date the wages were earned. This interpretation was not restricted to charges of real property.[76] Thus, the claim of a mortgagee of personal property will now rank after a lien created by section 15, regardless of when that mortgage was created or registered.

Section 15 also provides that the lien now has priority over "*all liens*, judgments, charges or any other claims or rights . . .", whereas the former section 114 provided that the lien had priority over "any other claim or right . . ." It would appear that the addition of the words "all liens" will now mean that the lien will have priority over liens filed under the *Builders Lien Act*[77] (formerly the *Mechanics Lien Act*). In *Ocean Air Conditioning & Refrigeration Contractors Ltd*. v. *Dan*,[78] the Court of Appeal had held that the wording in section 114 did not give the lien priority over mechanics' liens on the basis that the wording did not specifically state that the lien would have priority over such liens. Branca J.A. explained why the legislature did not intend to give the lien such priority:[79]

> The reason appears to me to be quite plain. The *Mechanics' Lien Act* traditionally was legislation enacted to give special privileges and protection to workmen who bestowed work, labour or services, skilled or unskilled, upon an improvement and to protect materialmen supplying materials to and for that improvement.
>
> The special protection was in the nature of a lien attaching the interest of the owner of the improvement, the improvement itself, the materials delivered to or placed upon the land upon which the improvement is situate and upon the land itself.
>
> To provide additional protection, all moneys paid on account of a contract price and received by the contractor or subcontractor were subject to a trust constituted by the Act. The fund in the hands of the recipient was to be held for the benefit of certain people, including the owner, the recipient himself, the Workmen's Compensation Board, the workmen and materialmen. The recipient became the trustee of such funds for the purposes mentioned. A specific term of the trust so legislated was that the recipient was not permitted to appropriate or convert any part of such trust funds unless and until all workmen, materialmen and contractors were fully paid. The Act also provided for holdback provisions,

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[75] *Supra*, n. 66.

[76] *See, e.g., Evan Williams Truck Sales Ltd.* v. *West*, (1979) 10 B.C.L.R. 231 (B.C.S.C.).

[77] R.S.B.C. 1979, c. 40.

[78] [1977] 3 W.W.R. 456.

[79] *Ibid*. at 463.

> all designed to protect workmen and materialmen. It also provided that the liens of a holder or claimant for a mechanics' lien were charged on the holdback. The Act provides very strict conditions for filing liens and for starting actions to protect the lien and for enforcement. The statute makes provision for owners to pay money into court in satisfaction of liens in order to obtain cancellation thereof.
>
> A workman's lien, if not filed in the manner and within the time prescribed by the *Mechanics' Lien Act*, lapses and he loses all the security provided for him in the Act.
>
> If the submission of the appellant were a sound one then that workman, having lost all entitlement to a mechanics' lien, could well go to the board and, having proven to the board that he has not proceeded with any action for the recovery of the unpaid wages, request a certificate under the provisions of the Act which would then, by virtue of s. 5A, give to the workman in question, who has lost his right of the mechanics' lien, priority over his fellow workmen who have filed liens. The suggestion seems, and is, absurd.

The suggestion that to Branca J.A. was "absurd" would now appear to be a reality as a result of the current wording of section 15. It could be argued, however, that the change will be beneficial in that it will encourage employees to follow the procedure established by the *Employment Standards Act* where the Director of Employment Standards can assert a single claim on behalf of all employees as opposed to individual employees filing separate liens under the *Builders' Lien Act*. Such considerations, however, are inapplicable with respect to the rights of builders' lien claimants who are not "employees" within the scope of the *Employment Standards Act*.

Another potential difficulty, which possibly existed under the former provision, is the possible liability of a *bona fide* purchaser. Section 15 provides that the amount set out in the Director's certificate constitutes "a lien . . . against all the real and personal property" of the employer. As registration of the certificate is not required to perfect the lien, it is possible that a third party might purchase real or personal property in ignorance of a lien that has attached to that property.

Finally it should be noted that sections 19 and 20 of the Act also impose personal liability for unpaid wages on the directors and officers of corporate employers, and also upon "associated" corporations. These sections provide:

> *Corporate officer liability*
>
> 19. A person who was a director or officer of a corporation at the time wages of an employee of the corporation should have been paid is personally liable for the unpaid wages in an amount not exceeding 2 months' wages for each employee affected, and this Act applies to the recovery of the unpaid wages from that person.
>
> *Associated corporations*
>
> 20. Where the director or the board considers that businesses, trades or undertakings are carried on by or through more than one corporation, individual, firm, syndicate or association, or any combination of them under common control or direction, the director or the board may treat tne corporations, individuals, firms, syndicates or associations, or any combination of them, as constituting one person for the purposes of this Act, and they are jointly and severally liable for payment of the amount set out in a certificate or order made under this Act and this Act applies to the recovery of that amount from any or all of them.

The forerunner of section 19 was section 15A of the *Payment of Wages Act* which was carried forward in the 1979 Revised Statutes of British Columbia as section 125 of the *Employment Standards Act*.[80] Section 125 provided:

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[80] *Supra*, n. 68.

> **125.** Every director and other officer of a corporation is liable for the unpaid wages of the employees of the corporation, but not exceeding the equivalent of 2 months' wages for each employee who has not been paid. The provisions of this Part apply, with the necessary changes and so far as they are applicable, to the recovery of any wages from a director and other officer of a corporation that does not pay its employee's wages.

It has been held that this wording puts a "director in the place of the employer," and, accordingly, the lien for unpaid wages also attaches to property owned by any such director.[81]

Section 19 of the *Employment Standards Act* contains wording that would appear to be of similar effect in that it provides that the "Act applies to the recovery of the unpaid wages from" a director or officer. The former lien provisions, however, did not state specifically to whose property the lien attached, whereas under the current section 15, it attaches to "all the real and personal property of the obligor." Obligor is defined in the Act as "an employer or person named in a certificate as owing wages." Thus, as a director is personally liable for wages, and if the Director of Employment Standards issues a certificate naming the director as owing wages, the director becomes an "obligor" and, in our view, the lien would attach to that director's real and personal property. The priority of the lien would be governed by section 15 of the *Act*.

(b) *Workers Compensation Act*

Section 52 of the *Workers Compensation Act*[82] creates a lien in favour of the Workers' Compensation Board in respect of the amount of an employer's contribution to the accident fund established under that Act. The section provides:

> **52.** (1) Notwithstanding anything contained in any other Act, the amount due by an employer to the board, or where an assignment has been made under subsection (4), its assignee, on an assessment made under this Act, or in respect of an amount which the employer is required to pay to the board under this Act, or on a judgment for it, constitutes a lien in favour of the board or its assignee payable in priority over all liens, charges or mortgages of every person, whenever created or to be created, with respect to the property or proceeds of property, real, personal or mixed, used in or in connection with or produced in or by the industry with respect to which the employer was assessed or the amount became payable, excepting liens for wages due to workers by their employer, and the lien for the amount due the board or its assignee continues to be valid and in force with respect to each assessment until the expiration of 5 years from the end of the calendar year for which the assessment was levied.
>
> (2) Where the employer is a corporation, the word "property" in subsection (1) includes the property of any director, manager or other principal of the corporation where the property is used in, or in connection with, the industry with respect to which the employer was assessed or the amount became payable, or was so used within the period in respect of which assessments are unpaid.
>
> (3) Without limiting subsection (1), the board may enforce its lien by proceedings under the *Court Order Enforcement Act*.
>
> (4) The board may assign its lien rights to a person, contractor or subcontractor who has fully discharged his liability for the amount of an assessment under section 51 by payment of it.
>
> (1.1) The exception in subsection (1) does not apply in respect of a lien for wages, that is, by section 15 (3) of the *Employment Standards Act*, postponed to a mortgage or debenture.

The lien has priority "over all liens, charges or mortgages of every person, *whenever created* or to be created." It has therefore been held that the lien has priority over a lien of the Crown for unpaid social services tax.[83] It has also been held that in view of this clear wording, the lien does not merely attach to the equity of an employer but to the whole of the property.[84] The only limitations provided in section 52 are that the lien attaches only to property or proceeds of property used in connection with or produced by the industry with respect to which the employer was assessed,[85] and that it does not have priority over "liens for wages due to workers by their employer."

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[81] *Credit Foncier Franco-Canadien* v. *Burridge*, *supra*, n. 68; *Orca Investments Ltd.* v. *Vaugier*, (1982) 129 D.L.R. (3d) 756 (B.C.S.C.).

[82] R.S.B.C. 1979, c. 437.

The Act was revised in 1968[86] to provide specifically that the lien attaches to "proceeds of property". It would appear that this amendment was introduced as a result of the Supreme Court of Canada decision in *Workman's Compensation Board* v. *Bank of Montreal*,[87] where it was held that in the absence of legislation specifically extending the lien to cover proceeds of property, such proceeds will not be impressed with the lien created by the section.[88]

The exception in favour of "liens for wages due to workers by their employers", would include liens arising under section 15 of the *Employment Standards Act*,[89] liens under the *Woodworker Lien Act*,[90] and under the *Builders Lien Act*.[91] An exception to this exception was, however, enacted in 1980 as section 52 (1.1).[92] This section provides that the exception does not apply if the lien for wages is postponed to a mortgage or debenture by section 15 (3) of the *Employment Standards Act*. It would appear that this was enacted to avoid circular priorities. In the absence of such a provision a situation could arise where a lien for wages has priority over a lien in favour of the Workers' Compensation Board and the lien of the Workers' Compensation Board has priority over a mortgagee, but as a result of the operation of section 15 (3) of the *Employment Standards Act*,[93] the mortgage would be deemed to have priority over the lien for wages.

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[83] *Dunwoody* v. *Worker's Compensation Board*, [1980] B.C.D. Civ. 539-01 (B.C.S.C.).

[84] *Workmen's Compensation Board* v. *Sumas Oil & Gas Co.*, [1933] 2 W.W.R. 121 (B.C.C.A.); *North West Life Assurance Company of Canada* v. *Westbridge Construction Ltd.*, (1980) 111 D.L.R. (3d) 135 (B.C.S.C.); *Kinross Mortgage Corpn.* v. *Bushell*, (1980) 109 D.L.R. (3d) 394 (B.C.S.C.). It does not, however, have priority over a vendor's interest in property that has been sold by way of an agreement for sale, as that interest is that of a registered owner and not that of a lien holder, *River Road Marina Holdings Ltd.* v. *Greenwich Shipyard Ltd.*, (1981) 22 B.C.L.R. 101 (B.C.S.C.)

[85] In *Workmen's Compensation Board* v. *Werner*, (1959) 29 W.W.R. 47 (B.C.C.A.), it was held that the section does not give the Board a lien upon property other than that of a defaulting employer; *see also Workers' Compensation Board* v. *Dawson Products*, [1980] B.C.D. Civ. 3866-01 (B.C.S.C.); *Kinross Mortgage Corpn.* v. *Bushell*, *ibid*; the burden is upon the Board of proving that the property is used "in connection with or produced by the industry," *River Road Marina Holdings Ltd.* v. *Greenwich Shipyards Ltd.*, *ibid*.

[86] S.B.C. 1968, c. 59, s. 49 (1).

[87] [1968] S.C.R. 187.

[88] *See also Dinning* v. *Workmen's Compensation Board*, [1932] 1 W.W.R. 136 (B.C.C.A.).

[89] *Supra*, n. 66.

[90] R.S.B.C. 1979, c. 436; *see e.g. Re Johnson Exports Ltd.*, *Ex parte Canada Creosoting Co.*, (1962) 39 D.L.R. (2d) 95 (B.C.S.C.); *Re Workmen's Compensation Board and Western Wood Products Corp.*, (1962) 38 W.W.R. 552 (B.C. Co. Ct.).

[91] *Supra*, n. 77.

[92] *Supra*, n. 66, s. 123.

[93] *Ibid*.

CHAPTER VIII

CROWN PRIORITY GENERALLY: AN EVALUATION

A. Arguments in Favour of a General Right in the Crown to Priority

In its recently published Report on the Priority of Crown Debts,[1] the Senate Standing Committee on Constitutional and Legal Affairs of the Parliament of the Commonwealth of Australia identified two reasons which, historically, have been advanced to support of Crown priority:[2]

> (i) the Crown is not able to choose its debtors, particularly in regard to taxation; and
>
> (ii) the necessity to protect the reserves of the Crown and thereby maintain the financial stability of the government.

The Committee concluded that "while it is apparent that these reasons were once valid, it is clear that they no longer have the same force."[3] These reasons also failed to persuade the Scottish Law Commission that the Crown should continue to enjoy some degree of priority over other creditors of a bankrupt.[4]

In Canada, the same arguments were also considered in the context of the appropriate priority of the Crown in bankruptcy proceedings. The Report of the Study Committee on Bankruptcy and Insolvency Legislation in Canada stated:[5]

> It is, we believe, important to re-examine the public policy in respect of the Crown priority. It must be determined whether such a priority is justified in a modern society. Certainly, it is not necessary for the financial stability of the government. The argument that the Crown cannot choose its own debtor has some relevance in claims for taxes, but none, as regards contractual claims. In this respect, it should be pointed out that individuals claiming damages do not choose their debtors either; and yet, they do not benefit by a priority of rank. One wonders whether, in our economy of easy credit, the businessman has always the economic freedom to choose his debtor or whether he is not bound, to a certain point, to give credit to the same extent as do his closest competitors. It could even be argued that the government should rank after ordinary creditors, as the public treasury is, in fact, in a better position than anyone to bear the inevitable losses. The government can, in effect, divide the burden of tax left unpaid by the bankrupt among all the taxpaying public. It would be more logical for the government to do this, than to take advantage of the bankruptcy of an insolvent taxpayer to reimburse itself, at the expense of the creditors who have already suffered losses. Certainly, there can be no rational explanation for the government to attempt to obtain payment of the tax due by a bankrupt from his creditors. Such a proposition offends one's sense of natural justice.

Those remarks were endorsed in the Australian Committee Report.[6]

One commentator, however, has taken exception to this view, noting that it is not necessarily true that the public treasury is in a better position to bear any loss.[7] Even where the public treasury is in a position to bear the loss, the same commentator fails to see why this should govern the "worthiness" of a claim. To this commentator, the *Bankruptcy Act* is not a particularly efficient means or the appropriate place to effect what he sees as a "reallocation of societal worth", based upon the "depths of [a creditor's] pocket."[8]

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[1] Parliamentary Paper No. 169/1978.

[2] *Ibid.* at 6.

[3] *Ibid.*

[4] Scottish Law Commission, Report on Bankruptcy and Related Aspects of Insolvency and Liquidation, 1982, 216–232.

[5] Government of Canada Publication (1970) at 122.

[6] *Supra*, n. 1 at 7.

[7] Morris G. Shanker, The Worthier Creditors (And a Cheer for the King), (1975-76) 1 Can. Bus. L.J. 340, at 343.

[8] *Ibid.* where he cites by way of example the recent financial difficulties of cities such as New York.

The Australian Committee Report also considered another possible justification for Crown priority:[9]

> Apart from these 2 factors which are no longer satisfactory as a basis upon which to support the general concept of Crown priority, there remains only the general expression of the Crown's rights in terms of its representative function: that as debts due to the Crown are in essence debts due to the community there is some justification for claiming that they should take priority over debts due to the individual.

The Committee did not consider that the justification of the Crown's priority in terms of the protection of a debt due to the community provided sufficient support for the concept of priority. In fact the Committee seriously doubted whether the community as a whole would support the retention of the priority in its name at the expense of creditors who suffer the consequences of a winding-up much more directly.[10]

The Scottish Law Commission also found this argument unpersuasive, noting that the objections in principle to the doctrine that debts owed to the community should take precedence are well summed up in the following passage from the opinion of Lord Anderson in *Admiralty* v. *Blair's Trustee:*[11]

> In the case of *Palmer* Lord Macnaghten justifies the doctrine on the ground that its assertion results in the benefit of the general community (that is, the general body of taxpayers) although at the expense of the individual. I should have thought this was a reason for condemning the principle. Why should individuals be made to suffer for the general good, especially in a case like the present, where the general benefit is infinitesimal but the individual loss substantial?

We agree that the desirability of Crown priority, as an overriding general rule, is very difficult to sustain in this day and age. Moreover, there are a number of significant arguments that support its abolition; it is to these that we now turn.

B. Arguments Against a General Right in the Crown to Priority

It has been pointed out that the *opportunities* to assert Crown priority have increased markedly in recent years:[12]

> Whatever the logic or lack of logic there is in the priority of the Crown, the cumulative impact of the priority has substantially increased since the Second World War. Crown priorities have grown in three dimensions: (1) the rates of existing or old taxes have been increased; (2) there have been many new kinds of taxes; and (3) the Crown has become extensively engaged in business, particularly through the use of Crown corporations to which the Crown priority has been held, in many cases, to apply. The apathy of creditors to take part in the administration of an estate in bankruptcy can very well be explained by reason of the Crown priority. Very often, for the creditors to involve themselves in the administration of estates is equivalent to their volunteering as agents of the public treasury.

It is difficult to estimate how far creditor apathy in the administration of an estate in bankruptcy is due to the increased impact of the priority of the Crown. One writer has suggested that creditors are apathetic because bad debt losses are generally a relatively small percentage of a creditor's total gross income, and that any increase in the dividend realized on a bankruptcy would have little impact on the total losses which creditors sustain on account of bad debts.[13] The same writer also suggests that people in business will always devote their major energies to money making business activities, and that if bankruptcy losses were lessened by eliminating the priority of the Crown, there would be less economic motivation for creditors to abandon their active businesses in favour of devoting themselves to the affairs of their bankrupt debtor.[14] Finally it is his view that there is little place in bankruptcy administration for individual creditors to get involved, even if they wanted to and that:[15]

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[9] *Supra*, n. 1 at 7.

[10] *Ibid.* at 8.

[11] *Supra*, n. 4 at 217.

[12] *Supra*, n. 5 at 123.

[13] *Supra*, n. 7 at 346–348.

> Successful and vigorous prosecution of a bankruptcy administration . . . depends upon the efforts of its bankruptcy officials; and it is upon these officials—and not their own individual efforts—that the creditors properly place reliance to protect their interest. These bankruptcy officials already have a first priority claim to the bankruptcy estate's assets for the fair value of the services they render. Thus, whatever economic motivations are needed to bring about effective bankruptcy administration for the protection of creditors' interests already exists. It is hard to fathom why the officers of bankruptcy administration will be more vigorous in collecting assets for the bankruptcy estate and otherwise carrying out their duties, simply because there is set up a different scheme for distributing these assets among the various creditors.

We note, however, that the potential for massive government intrusion into the distribution of money or property under laws of general application can have a significant economic impact. An American commentator, addressing himself to government priority under the bankruptcy law of the United States has stated:[16]

> The unprecedented multiplicity and magnitude of tax claims is greatly aggravated by their priority . . . They strike the commercial community where it is weak by further impairing the financial condition of creditors who have had the misfortune of extending credit to a bankrupt. Unless governments can stop proliferating taxes to lavish largesse on politically favoured groups and to give public credit to those unworthy of private credit, bankruptcy may become just another device for paying official salaries. Dividends of priority creditors and to general creditors in bankruptcy have been less than 5¢ per capita per annum in relation to the national population, so the revenue at stake is chicken feed, but the commercial repercussions of accentuating bankruptcy frustrations may be disproportionate.(17)

The Report of the Australian Senate Committee identified several reasons supporting the abolition of Crown priority. These reasons were explored in the particular context of Australian insolvency laws, but some are of broader application.

1. HARDSHIP:

> By far the most important of these objections is the hardship which is experienced by creditors who have not been repaid debts owing to them because the remaining assets have been used to pay debts owing to the Crown. Many instances have been brought to the Committee's attention concerning the hardship which has been experienced by employees, small businessmen and creditors of varying means who have been severely disadvantaged by the existence of the Crown's priority.(18)

This reiterates the objections that were quoted above referring to American law, and is a common complaint amongst those who believe that the prerogative right of prior payment of the Crown ought to be abolished. The hardship, frustration and practical problems created by the Crown's preferred position were illustrated in 1969 by a member of the House of Commons who said, when speaking to a motion to delete the privilege of the Crown in right of Canada as preferred creditor under federal statutes:[19]

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[14] *Ibid.*

[15] *Ibid.* at 348.

[16] J. A. MacLachlan, *Bankruptcy*, 284 (1956).

[17] For a review of the costs associated with the administration of a bankruptcy in Canada, *see* C. R. Diphcand and R. E. George, *The Cost of Bankruptcy*. C. A. Magazine, July 1977, 28.

[18] *Supra*, n. 1 at 27.

> For the benefit of those who are not engaged as lawyers or in any kind of collection work, it might be of interest to note that in the ordinary course of events an individual creditor will write to his debtor and request that payment be made. Invariably this leads to a dispute, so he retains the services of a solicitor. The solicitor then writes the usual letter, gets the usual reply, and files a writ in the court of competent jurisdiction. He then pursues this matter through all stages of the pleadings, takes it to trial, secures a judgment on behalf of his client and then files what is called a writ of *fi. fa.*, or writ of execution, against the judgment debtor which in fact attaches to all the assets of the debtor. Subsequently the solicitor will usually examine the debtor as a judgment debtor in an attempt to realize any assets which he has.
>
> Having gone through all this proceeding and having been paid for it by the client, it is somewhat difficult to go back to the client and say, "You have a judgment, but unfortunately this fellow was behind in his income tax and the government has realized on the one asset we were able to trace." I am not suggesting in this motion that the Crown should not be considered, I am only suggesting that the Crown should not be put in the position of a preferred creditor.

2. Inhibiting Effect of the Crown's Priority on Other Creditors

A creditor may be inhibited from pursuing his claim where it is possible that the Crown will intervene to assert its preferred position and so deprive that creditor of the fruits of his effort: there is little incentive to call into question the conduct of former officers of insolvent corporations if the Crown is likely to be the sole beneficiary of any money recovered. It may be that abolition of the priority would lead to improved observance of the law by corporations and their officers.

The Commercial Law Committee of the Law Council of Australia in a submission put it this way:[20]

> [A]ny inhibition restricting creditors from pursuing their legal rights against impecunious corporations should be carefully examined; for, in the view of the committee, improved standards of commercial morality and improved observance of the law by corporations and their officers must flow from more vigilant protection by creditors of their legal rights.

The Australian Senate Committee agreed with that view.

3. Forbearance and its Effect on Apparent Liquidity

Sometimes when a debt due to the Crown is not paid, the Crown extends a period of grace to the debtor to overcome a temporary financial difficulty before taking any action to recover. The Crown can give time without serious risk because of its priority. This practice, while commendable, clothes the debtor with an appearance of liquidity which is not supported in fact. Thus, third parties subordinate to the Crown's priority may be misled as to the extent of their risk and extend credit where they would not otherwise have done so.

This may occur on forbearance by any creditor but with exacerbated consequences if this creditor has priority.

This has been recognized not only by those who would abolish the Crown's priority but also by those who believe that the priority is, in certain circumstances, justified. For example, the Scottish Law Commission, in its Working Paper, took the view that the Crown's preference in respect of unpaid taxes should be limited in time, and that the Crown should only have a preference for debts outstanding beyond that time if those debts could not reasonably have been collected by that time.[21] A similar suggestion has been made by Morris Shanker who advocates the retention of the Crown's priority in respect of tax claims but who takes the view that this priority should not be given to the "lazy tax collector" who does not take advantage of the collection devices available once the tax debt is known.[22]

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[19] Extract from House of Commons Debates of 10th February 1969, reproduced in 12 C.B.R. (N.S.) 117 at 117-118.

[20] *Supra*, n. 1 at 30.

The Australian Senate Committee also considered but rejected the imposition of strict time limits as a possible alternative to the outright abolition of the Crown's priority.[23] While time limits would undoubtedly minimize the extent to which other creditors are denied assets because of the Crown's priority, the Committee concluded that anything short of total abolition would not solve the problems of complexity, uncertainty, delay and expense caused thereby which are the products of Crown priority.[24]

4. UNCERTAINTY OCCASIONED BY EXERCISE OF DISCRETIONARY POWERS

The Crown may decide not to insist upon its right to prior payment. The priority is often asserted selectively. In Australia, the submission of the Commissioner of Taxation, in defending the priority, suggested that the selective assertion of priority enabled the Crown to defer to worthier claims and so avoid hardship.

The desirability of vesting a discretion of this nature in the Crown is open to serious objection. It is akin to the position which formerly prevailed in British Columbia with respect to legal proceedings against the Crown. The potential plaintiff needed to get the permission of the Crown to sue: permission was granted only with respect to "worthy" claims. The policy that called for the abolition of that requirement applies with equal force to the discretion with respect to priority. The government or its representatives should not be permitted to act as judge and jury with respect to claims in which it is interested.

The Australian Senate Committee shared this conclusion.

5. ANACHRONISM

A final argument in support of the abolition of Crown priority is simply that it is an anachronism. The legal theory of Crown priority arose in an age which also gave rise to ideas such as "the divine right of Kings" and the notion that "the King can do no wrong" and is closely associated with them. Today, no one seriously regards these as operative principles in the conduct of government and it would seem to follow that, in the absence of special factors, the prerogative of the Crown to prior payment should be viewed in the same way and abandoned.

C. Reform

At this stage, a word in mitigation is perhaps in order. Our research into the nature and extent of Crown priority arising by virtue of the prerogative, our exposition of the law arising out of that research and the evaluation of that law are based almost entirely on situations and cases in which the Crown in right of British Columbia was not involved. For the purpose of expounding the law, this is not of crucial importance—the prerogative is the same irrespective of the aspect of the Crown in which it is vested.

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[21] Insolvency, Bankruptcy and Liquidation in Scotland, Memorandum No. 16 (1971) at 35. In the final Report, *supra*, n. 4, they did not adhere to their tentative view that a preference for the Crown should be retained.

[22] *Supra*, n. 7 at 348–349.

[23] *Supra*, n. 1 at 62.

[24] *Ibid.*

An examination of the Canadian case law concerning the prerogative indicates that the federal government most vigorously asserts its prerogative rights. This suggests that, so far as any inferences can be drawn from the reported cases, the Crown in right of British Columbia has behaved with comparative sensitivity in asserting the prerogative. This fact should not be lost sight of in the preceding or following discussions.

In our view the arguments against a general right in the Crown to priority are overwhelming and that the prerogative right to prior payment should be abolished. It is simply too rigid a rule for justly defining legal rights and even if used sparingly is objectionable. Occasionally, the assertion of the prerogative is capable of achieving a result that can be justified in terms of social policy but that is more often a matter of accident than design. Its assertion, in the majority of situations in which it might be asserted, would more often produce unfair results.

Even if one adopts the position that there may be cases in which the claim of the Crown should be preferred, the prerogative right, as a rule of general application, proceeds on an entirely wrong principle. Essentially, the prerogative demands that priority should be determined by reference to the character of the creditor rather than by the character of the claim. This is indefensible in a society that long ago completed the transition from status to contract.

The anachronistic character of the prerogative, its potential for unfair results, that it has been significantly eroded in recent years, that this trend will continue, and that it appears to be used sparingly by the Crown in right of British Columbia, lead to the conclusion that it should be abolished. Any preference for the Crown or its agencies should be given by statute and clearly defined by criteria unrelated to the special character of government.

It is worth noting that the Australian Government has followed the basic recommendation of the Australian Senate Committee that the Crown's priority be abolished.[25]

With one reservation, therefore, we recommend that this priority be abolished. Our reservation concerns the position of the Crown in right of British Columbia when it is in competition with other aspects of the Crown, such as the federal government or the Crown in the right of another province. In Canada there may be a number of aspects[26] of the Crown, as sovereignty has been divided among the federal government and the ten provinces.[27] In a federal system questions and conflicts must inevitably arise. Two issues emerge:

(1) How far can legislation enacted by one aspect of the Crown limit the prerogative enjoyed by another aspect, and

(2) When competing claims arise between two different aspects of the Crown, each relying on the prerogative, how is the competition to be resolved?

How far may one aspect of the Crown, by legislation, limit the prerogative right of another? Numerous cases affirm the principle that it is beyond the power of a province to enact legislation that affects the prerogative right to prior payment of the Crown in right of Canada.[28]

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[25] *See Crown Debts (Priority) Act*, 1982; *see also* Cth. Parl. Debs., H.R. 13th September 1979, at 1107, as cited in (1980) 54 A.L.J. at 420.

[26] We use the word "aspect" to refer to the Crown in right of a particular jurisdiction.

[27] *See Liquidators of Maritime Bank* v. *Receiver-General of N.B.*, [1892] A.C. 437 (P.C.).

[28] *Emerson* v. *Simpson*, (1962) 38 W.W.R. 466 (B.C.S.C.); *Re Adams Shoe Co.*, [1923] 4 D.L.R. 927 (Ont. S.C.); *R.* v. *Lithwick* (1921) 20 Ex. C.R. 293; *Toronto* v. *Wade*, [1931] O.R. 470 (H.C.); *Sternschein* v. *R.*, (1965) 51 W.W.R. 437 (Man. Q.B.); *R.* v. *Hamilton*, (1962) 37 D.L.R. (2d) 545 (Man. Q.B.); *and see Manitoba Securities Commission* v *Imperial Bank of Commerce and Showcase Realty*, [1979] 2 W.W.R. 526, *per* Monnin, J.A. at 533 (Man. C.A.)

On the other hand it seems that the Crown in right of Canada has the power to limit the prerogative of a province through legislation otherwise within its competence, although this issue has not been extensively tested in the courts. The most important example of the exercise of this power is, of course, the *Bankruptcy Act*[29] which, *inter alia*, specifies the priority of Provincial Crown debts.[30]

Hence, while the prerogative of the Crown in right of British Columbia can be limited by provincial legislation, the federal prerogative is beyond provincial reach.

What is the result when the priorities accorded to two different aspects of the Crown collide? The position seems to be that the funds in issue are divided between the competing claims *pari passu*. This result has been held to be appropriate whether the conflicting priorities have their bases in the prerogative[31] or statute.[32]

D. Implications of Reform

If the provincial prerogative right of prior payment were abolished, arguably the position of the Federal Crown (as indeed any aspect of the Crown retaining the prerogative) would be enhanced in a competition. This possible consequence of our proposal is disturbing. The effect of that proposal should not be to fatten the purses of competing governments.

What approach should be taken to the prerogative in this context? Some examples may highlight the difficulties that must be considered in developing an appropriate policy. In these examples the competing creditor has neither obtained judgment nor commenced execution proceedings. If the creditor had done so the provincial prerogative would have been eliminated by virtue of the *Creditor Assistance Act* as explained previously.

EXAMPLE 1

A debtor (D.) owes $10,000 to each of the Province of British Columbia (B.C.) and the Government of Canada (C.). A fund of $12,000 is available to satisfy those claims.

RESULTS

(a) *Under the Current Bankruptcy Act*

B.C. and C. would both be preferred creditors and would share *pari passu:* B.C. gets $6,000 and C. gets $6,000.

(b) *Under the Proposed Bankruptcy Act*

B.C. and C. would both be ordinary creditors and would share *pari passu:* B.C. and C. each get $6,000.

(c) *Distribution Outside Bankruptcy*

(i) *Present Law*

If B.C. and C. rely on the prerogative the distribution would be as in (b).

(ii) *Provincial Prerogative Abolished*

Here claim of B.C. may be subordinated to that of C. C. gets $10,000, B.C. gets $2,000.

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[29] R.S.C. 1970, c. B-3.

[30] *Re Silver Bros.*, [1932] A.C. 514; *Re Bourgault*, (1980) 105 D.L.R. (3d) 270.

[31] *Re Dep. Sheriff of Calgary v. Walter's Trucking Service Ltd.*, (1965) 51 W.W.R. 407 (Alta. S.C.-A.D.).

[32] *Re Silver Bros., supra*, n. 30; *Re Navilla Ice Cream Co. Ltd.* [1934] 4 D.L.R. 741 (Ont. S.C.); *Stroud & Dakota Enterprises Ltd. v. Imperial Oil Ltd.*, (1961) 28 D.L.R. (2d) 366 (Sask. C. A.).

These results suggest that it might be appropriate to retain the prerogative in a contest in respect of a fund in which another aspect of the Crown is also interested. However, doubt is cast on this approach if the rights of a subject are also involved.

EXAMPLE 2

Facts as in Example 1 but an additional creditor (S.), a subject, also has a claim on the fund for $10,000.

RESULTS

(a) *Under the Current Bankruptcy Act*

B.C. and C. would be preferred creditors who share *pari passu:* B.C. and C. each get $6,000. S. gets nothing.

(b) *Under the Proposed Bankruptcy Act*

B.C., C. and S. would be ordinary creditors who share *pari passu:* B.C., C. and S. each get $4,000.

(c) *Distribution Outside Bankruptcy*

(i) *Present law*

S.'s interest would be subordinated to the two prerogative rights: B.C. and C. would share *pari passu* and each would get $6,000.

(ii) *Provincial prerogative abolished*

C.'s claim would have priority. B.C. and S. would share the balance *pari passu: C.* gets $10,000, B.C. gets $1,000, S. gets $1,000.

The reason for abolishing the prerogative is to give S. a fair share in a distribution. While S. is better off in the example with the prerogative abolished than at present, it is evident that the main beneficiary is C. If the available fund were smaller, say $8,000, S. would recover nothing under either rule, because of the federal priority for its $10,000 claim.

To our mind the proper solution is the one that would arise out of the application of the priorities under the proposed *Bankruptcy Act*. On the assumption that the *Act* goes forward in its present form we see only a limited need to preserve the prerogative right in competitions with other aspects of the Crown. In a majority of cases, if the interests of the Province, or of an individual subject, are threatened, steps can be taken to bring the dispute within the framework of bankruptcy law so as to ensure fair sharing. On balance we feel that the benefits of total abolition outweigh any advantages that might flow from limited retention of the Crown prerogative.

We would, however, urge that representations be made to the governments of other provinces, and in particular, to the federal government for abolition of the prerogative throughout Canada.

The Commission recommends that:

1. The prerogative right of the Crown in right of British Columbia as a creditor to priority over other creditors of the same debtor be abolished.

CHAPTER IX STATUTORY CROWN LIENS: REFORM

A. Introduction

The discussion in Chapter VII illustrates the varying degrees of priority enjoyed by different claims advanced by the Crown, and the complexity of the law surrounding them. It also highlights the impact that the bankruptcy of a debtor may have on the degree of priority enjoyed by the Crown. The varying degrees of priority, the complexity of the law, and the frequency, almost on an annual basis, with which some of the statutory provisions are changed, create difficulties not only for other creditors of the debtor and their legal advisers, but also for receivers and other administrators of insolvent estates.These difficulties suggest to us that at a minimum, the law should (1) make abundantly clear when a lien attaches and what interest is attached, and (2) provide for proper notice to third parties of the lien's existence. This approach was recently adopted in California where, following recommendations of the California Law Revision Commission,[1] a bill was enacted which consolidates the various tax lien provisions in that state.[2] It provides, for example, protection for security interests perfected prior to the lien and rules for determining the priority between competing state tax liens. The relevant provisions of the California Code are reproduced in Appendix C.

We believe, however, that quite apart from rationalizing the law along the above lines, certain liens given to the Crown may not be justified and that the appropriate approach to reform would therefore be to abolish them. As we stated in the previous chapter, any preference given to the Crown should be by statute only and in circumstances which can be justified by criteria unrelated to the "special character" of government. In this chapter, therefore, we examine the extent to which the preferential treatment these liens confer on the Crown can be justified. If, in our view, a particular lien cannot be justified we propose that the lien be abolished. If it can be justified, we make proposals aimed at rationalizing the law. In the majority of cases the arguments which supported the abolition of the prerogative right to prior payment also support repeal of a corresponding statutory right.

B. Impact on Crown Revenues

We noted in the previous chapter that Crown priority is often justified as being necessary to protect Crown revenues. We also concluded that this was insufficient reason to support a general right to priority in the Crown. With respect to statutory liens, we are, of course, alive to the fact that the abolition of any particular lien may reduce the effectiveness of the collection of Crown debts, and may in turn lead to some loss of revenue. We would like to emphasize from the outset, however, that we are firmly of the view that this possibility, by itself, cannot justify the retention of any particular lien. Indeed, it is possible that abolition will lead to the development of more effective and prompt collection methods. Apparently this is what has happened in Ontario, as was noted by the Minister of Revenue for Ontario in 1979 when he introduced legislation which reduced the scope of the lien for corporation tax in the Province, and stated:[3]

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[1] Recommendations Relating to Enforcement of Judgments, State Tax Liens, 15 Cal. L. Revision Comm'n. Reports 29 (1980).

[2] State Tax Liens, 1980, Chapter 600, 6 Cal. Leg. Serv. 80 at 4717 *See also* Report of Assembly Committee on Judiciary on Senate Bill No. 1541 noted in Assembly J. (May 29, 1980) at 15523, reported as Appendix IV to the Annual Report for 1980 of the California Law Revision Commission.

[3] Ontario Legislative Debates, November 6, 1979, 4245.

> The development of more effective collection methods, concentrating on delinquent payments and noncompliance with statute requirements, has enabled us to protect revenues where the statutory lien provisions have been repealed to date. This gives us every reason to expect the same result with respect to corporation taxes. In view of this, I believe the statutory lien is no longer required under the *Corporations Tax Act*.

On making enquiries of the Ministry of Revenue in Ontario, we were informed that this "expectation" has been realized.

Following publication of the Working Paper, the Commission met with a representative of the Ministry of Finance who stressed, in particular, the probable loss in Crown revenues if its statutory liens were abolished. We were informed that while the Ministry has not undertaken any study of the amounts it recovers because of the liens which now exist, those responsible for collection of unpaid taxes estimate that the liens contribute to the recovery of millions of dollars of taxes every year.

We are, of course, concerned that any recommendation we make might lead to a reduction in Crown revenues. We would note, however, that it is possible that better collection techniques, coupled with some type of consensual security would allow the Crown to protect its revenues without resort to a statutory lien. We have not explored these possibilities in great detail and are therefore reluctant to make any recommendations in this regard. Nor do we think it appropriate for us to do so, as these are matters of detail best left to those with the proper financial expertise.

In summary, therefore, we share concerns about loss of revenue if any lien is abolished, but have concluded that, as a general rule, the possible loss in revenue does not justify the retention of a priority that works an injustice on other creditors.

C. Impact of the Bankruptcy Act

Before proceeding with our recommendations we believe that it is desirable to examine some of the issues raised by the recent cases on the effect of bankruptcy on particular Crown liens. It is imperative that our recommendation be considered in relationship to these developments.

In Chapter VII we noted that *Re Bourgault*,[4] and the decisions following it, have had a profound effect on Crown priority where there is a bankruptcy. We also noted that creditors may use bankruptcy to defeat any priority accorded the Crown under provincial law. As a result of these developments two different sets of priorities exist, one when there is a bankruptcy and one where there is an insolvency but no bankruptcy. An initial question therefore arises, in considering any proposals for reform, whether these priorities should or could be reconciled, and if so, the extent to which it is appropriate for this Commission to address the issue.

In one response to the Working Paper it was noted that the use of bankruptcy to circumvent Crown priority is a direct result of the Provincial Crown asserting a priority in respect of a debtor that it could not assert against his estate after a bankruptcy. It was that respondent's view that as a matter of "public probity" the provincial legislature ought not to be creating and the provincial Crown ought not to be asserting a priority that cannot survive a bankruptcy.

The same respondent noted that Crown priority is most relevant, in a practical sense, in cases of bankruptcy or insolvency of the Crown's debtor. As these are matters assigned exclusively to the jurisdiction of the Parliament of Canada, bankruptcy legislation establishes the ultimate position in law as between the Crown and subject in this field. In view of this, the following comment was made:

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[4] [1980] 1 S.C.R. 35.

> Assuming that there is no relevant constitutional change in the distribution of legislative powers, and that bankruptcy and insolvency remain with Parliament, and property and civil rights remain with the provincial legislatures, then it may be assumed that *Re: Bourgault* will continue to be law in Canada. If that is so, then, in our opinion, the question of the priority to be accorded to debts of the provincial Crown must be resolved by an exercise of co-operative federalism, that is to say, by seeking to have incorporated in the federal bankruptcy legislation the priorities which the province desires. The federal bankruptcy legislation has been in the melting pot for more than ten years and it may well be transformed into a solid ingot within the next year or so. In our view the exercise of co-operative federalism ought to be undertaken straight away. The concern of law reformers should then be to ensure that the provincial legislation gives proper recognition to rights accorded by the *Bankruptcy Act*, as it is eventually enacted.

Others have also echoed this view. In a recent address to the Canadian Insolvency Association,[5] R.G. Mackeigan, after noting that the application of *Bourgault* will mean that it is more advantageous for a secured creditor if a bankruptcy takes place—resulting in a wider application of the *Bankruptcy Act*, said:[6]

> This, I suggest could and should be overcome in large part by federal legislation stating that the same order of priorities shall apply in all cases of insolvency whether or not bankruptcy takes place. The *British North America Act* gives authority to the federal government to deal with matters relating to insolvency generally, not just bankruptcy. I am not a constitutional expert, but I see no reason why federal legislation applicable to receivership cases, would not be valid, if the debtor was insolvent.
>
> This would avoid the necessity of considering when acting for secured creditors, two sets of priorities, namely one when there is a bankruptcy and one when there is a receivership without bankruptcy.
>
> Without such a solution, we are likely to see more bankruptcies for the main purpose of affecting priorities among competing secured creditors. Without such a solution, you will also see a continuation of lawyers hedging in opinions on priorities.

Some initiatives, albeit in a limited context, are being made along the lines suggested above. In a recent Report of a Committee on Wage Protection in Matters of Insolvency and Bankruptcy[7] a new system was recommended for protecting the wages of employees where their employer is insolvent. The system would cover all insolvencies and would not be restricted to cases where the employer is put into bankruptcy. The Committee recommended that for an initial period of three years unpaid wages should be covered by the Federal Consolidated Revenue Fund. The Committee then recommended that during the three year period meetings take place between the provincial and federal governments to resolve the multitude of administrative, organizational and procedural details that will arise. The multiplicity of federal and provincial statutes should then be replaced by a comprehensive wage protection system to cover all insolvencies.

It is also interesting to note that in at least one decision, the courts have taken the view that the administration of insolvent estates should properly proceed under federal bankruptcy legislation. In a recent decision, the Manitoba Court of Appeal[8] held that once a debtor becomes insolvent, it was not appropriate for the administration of the estate to proceed under provincial law. That case involved an appeal from an order giving directions to a receiver of an insolvent company. O'Sullivan J.A. stated:[9]

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[5] The address entitled, "Priority for Provincial Statutory Trust and Lien Claims in Bankruptcy," is reproduced in the Insolvency Bulletin, issued by the Office of the Superintendent of Bankruptcy, January 1982, Vol. 2, at 2.

[6] *Ibid*. at 6.

[7] Report of the Committee on Wage Protection in Matters of Bankruptcy and Insolvency, October 1981

> . . . I think that, once it appears that the debtor is insolvent, it is not appropriate to continue proceedings under provincial law. Indeed, it may well be unconstitutional to do so. I think the proper course is to direct the receiver to make an assignment in bankruptcy.
>
> In *Re Western Hemlock Products Ltd.* (1961), 35 W.W.R. 184, 27 D.L.R. (2d) 457, Macfarlane J. of the British Columbia Supreme Court dealt with a motion for directions in a voluntary winding-up under the British Columbia *Companies Act*, R.S.B.C 1948, c. 58. He found that the company was obviously insolvent. At p. 187 he said:
>
> > Once a company in a voluntary winding-up is shown to be insolvent, I think the proper course for the liquidator to take is to file an assignment in bankruptcy or take other appropriate action to put the company in bankruptcy and proceed under that Act.
>
> He held that it was improper to give directions in winding-up to the liquidator, since the company was insolvent and federal law should be applied.
>
> This case was considered in *Re Brandon Packers Ltd.: Re Rowe* (1962), 3 C.B.R. (N.S.) 326, 39 W.W.R. 1, 33 D.L.R. (2d) 503. In this court, three judges agreed that it was improper to continue with the winding-up once the company was rendered insolvent. Miller C.J.M., dissenting, thought that Monnin J. (as he then was), the trial judge, should have dissolved the winding-up order. Freedman J.A. (as he then was) and Guy J.A., however, thought the winding-up order was proper at the time it was made, and agreed that, once insolvency appeared, Monnin J. took the "sensible and practical way" when he ordered the liquidator to make an assignment in bankruptcy. There had been some question whether a liquidator could make an assignment or whether a creditor of the company itself would have to begin proceedings, but this court said that the Court of Queen's Bench has power to direct an assignment to be made.
>
> I may note that in bankruptcy there is a simple procedure for those who allege that they have securities to make claims. They must value their security. Furthermore, those who claim to be beneficial owners of trust property have an opportunity to prove their claims.

As bankruptcy was not argued before the court, the parties were given ten days to advise the court whether they wished to present further argument, otherwise the judgment of the court would be that the order be set aside and that the receiver be directed to file an assignment in bankruptcy.

The question arises whether, in the light of these developments, it is appropriate for this Commission to recommend changes to provincial laws concerning Crown priority. We believe it is appropriate. We believe that there will continue to be many instances where there is a *de facto* insolvency where the debtor is not placed into bankruptcy, particularly where the debtor has few unencumbered assets. We believe that there is an immediate need for rational laws at the provincial level to govern the position of the Crown and the priority, if any, that it should enjoy.

We agree that, ideally, federal legislation should perhaps govern all insolvencies and the priorities among competing creditors, and we applaud the recent efforts in respect of wage protection in insolvencies. We would therefore approve of any future efforts toward this goal. When, and if, this takes place, our recommendations will have to be reconsidered. In the meantime, we are convinced that there is an immediate need for reform at the provincial level.

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[8] *Manitoba Securities Commission v. Winnipeg Mortgage Exchange Ltd.*, (1981) 36 C.B.R. (N.S.) 78.

[9] *Ibid.* at 83-84.

D. Tax Related Claims

1. CLAIMS FOR UNPAID TAXES

Are there any criteria that would justify the retention of the Crown's lien under the various taxation statutes? These liens clearly aim to protect the revenues of the Crown, even at the expense of other creditors who had no notice of their existence. Under the *Corporation Capital Tax Act,*[10] and other taxing statutes, it is specifically provided that the lien is not impaired by want of registration. Such liens can date back several years. *Roadburg,*[11] for example, was originally heard in May 1978, while the first lien was held to arise in February 1976.

We recognize that the danger of third parties being misled as to the existence of a lien could be eliminated by enacting a provision similar to section 15 (3) of the *Employment Standards Act*[12] in respect of both real and personal property. Thus, the Crown's lien would only be perfected on, and its priority would only date from the date on which a certificate of judgment was registered under section 14 of the Act. We acknowledge that such a registration requirement would deal with the problem that potential lenders have in identifying the existence of a lien; it would not, however, address the fundamental question of whether the Crown should be entitled to a lien.

It is true that the Crown has no choice in extending "credit" to taxpayers by waiting to collect delinquent taxes, and, in a sense, is an involuntary creditor. It was on this basis some take the view that the Crown's preferential right to the payment of delinquent taxes should be maintained.[13] We do not believe, however, that this in itself justifies the retention of the lien. It is apparent that it is open to the Crown to allow taxes to go uncollected for a number of years, safe in the knowledge that its claim for these taxes is protected by its lien. It is our view tnat such dilatory behaviour in collecting delinquent taxes should not be encouraged or rewarded by giving the Crown priority over other creditors. If dilatory behaviour was the only concern, this might be met by providing an appropriate limitation period after which the lien would lapse. Such behaviour, however, is merely a by-product of the lien, and merely eliminating the possibility of dilatory behaviour would still leave open the question whether the Crown should be entitled to a lien at all.

In a Report on Land Registration,[14] the Ontario Law Reform Commission made a general recommendation that the liens of the government against specified parcels should be registered to be effective, and that liens of the government that attached to all land owned by a debtor should be abolished. It was the Commission's view that the substantial cost involved in searching, or the uncertain prospect of a claim if searches are not made, is greater than any possible loss of revenue to the government that would occur if the recommendation was implemented.[15]

The Ontario Commission recommended that liens to secure payment of corporations tax and succession duty should be excluded from the recommendations. The Commission noted that corporation tax was a major source of revenue and that the lien was a useful tool to collect this revenue. While it was admitted that no precise and reliable estimate could be made of the difference that abolition would make, the Commission believed that the revenue protected substantially exceeds the government and private costs occasioned by the lien.[16] The Commission accepted that the lien creates inconvenience and annoyance for lawyers and increases costs to their clients, but stated that these must be seen as unfortunate necessities. The protection of goverment revenue was the overriding factor which, to the Ontario Law Reform Commission, justified the special treatment given to claims for corporation tax or succession duty.[17]

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[10] R.S.B.C. 1979, c. 69, s. 38 (2).

[11] (1980) 110 D.L.R. (3d) 433 (B.C.C.A.).

[12] S.B.C. 1980, c. 10.

[13] *See*, Morris G. Shanker, *The Worthier Creditors (And a Cheer for the King)*, (1975-76) 1 Can. Business L.J. 340.

[14] Ontario Law Reform Commission, Report on Land Registration (1971).

[15] *Ibid.* at 38.

In fact, as we noted earlier, recent legislation in Ontario has reduced the scope of the lien in respect of corporations tax.[18] An amendment to the *Corporations Tax Act* has abolished the general lien and replaced it with a lien that attaches to land only and that has to be registered if it is to be effective against third parties.[19] In introducing this legislation, the Minister responsible pointed out:[20]

> In my ministry's quest for tax simplification and regulatory reform we have recognized that only a small percentage of taxpayers poses any collection problem and that both the direct and indirect costs of our requirements to Ontario's taxpayers must be a paramount consideration. I estimate that corporate taxpayers incur costs of approximately $1.25 million annually in applying for and obtaining corporations tax lien clearances. Added to this is the cost incurred by individuals who have to obtain lien clearances where they are acquiring property which at some time within the preceding five years was owned by a corporation.
>
> Because of the 20 per cent growth in lien clearance requests, taxpayer costs in this area would escalate substantially if the program were to continue. Over 200,000 applications for lien clearances are received yearly. For 80 per cent of these requests, approval is automatically given. The proposed measure to repeal the statutory lien will relieve the vast majority of taxpayers from complying with the present lien provision and thus represents a major step towards deregulation and tax simplication.

It is our conclusion that on balance the various liens that are created in favour of the Crown for unpaid taxes are unjustified. We believe that the arguments advanced in the previous chapter against a general right in the Crown to prior payment apply equally against liens for unpaid taxes.

We propose that such liens be abolished and that the Crown, if it wishes to obtain non-consensual security for payment of these taxes, be obliged to reduce its claim to that of a judgment, and that it only be able to rely on the mechanisms of enforcement including registration in the Land Title Office, that are available to other judgment creditors.

There is one type of lien, however, which we would exclude from our proposal which we have not examined in this paper, namely liens attaching to land in respect of arrears of real property taxes or claims that are assimilated to taxes on real property. Functionally, these taxes are used to maintain services, such as roads, sewers, etc., which in turn enhance the value of a property owner's land. Such taxes are also the principal source of revenue for such bodies as municipalities.

These taxes are also assessed on an annual basis, and purchasers of real property can easily ascertain whether taxes are in arrears by making a simple enquiry of the appropriate taxing authority. Furthermore, it is common for mortgagees to protect their interest in real property by providing in the mortgage that in addition to principal and interest the mortgagor shall pay over to the mortgagee an amount in respect of real property taxes, which the mortgagee then pays directly to the taxing authority.

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[16] *Ibid.* at 40–41.

[17] *Ibid.* at 41.

[18] S.O. 1979, c. 89, s. 1.

[19] *Ibid.*

[20] *Supra*, n. 3.

The Commission recommends that:

2. *The following lien provisions be repealed:*
   - *(a) section 38,* Corporation Capital Tax Act.
   - *(b) section 19,* Insurance Premium Tax Act.
   - *(c) section 28,* Logging Tax Act.
   - *(d) section 11,* Mineral Land Tax Act.
   - *(e) section 29,* Mineral Resource Tax Act.
   - *(f) section 28,* Mining Tax Act.

We should like to point out that this proposal should be considered in the light of certain procedural advantages currently enjoyed by the Crown. In an earlier chapter, we explained that the Crown often enjoys certain procedural advantages denied to other creditors, which allows it to bypass the normal litigation process in asserting its claims. One of these procedures is the "deemed judgment" whereby on the filing in court of a certificate setting forth the amount of taxes unpaid, that certificate has the same force and is enforceable in the same manner as a judgment. While such a procedure gives the Crown a headstart against other creditors, we do not propose that it should be abolished. It is our view that this procedure, by itself, does not result in any great injustice to other creditors. In view of the great numbers of taxpayers with whom the Crown deals, the administrative difficulties and expense that would be created by the abolition of this procedure and the burden abolition would place on the Courts, we propose that the Crown should continue to enjoy the summary remedy provided by these deemed judgment provisions.

2. CLAIMS FOR TAXES COLLECTED ON BEHALF OF THE CROWN

As we pointed out earlier, various statutes provide that taxes collected on behalf of the Crown are to be held or deemed to be held in trust. The majority of these statutes also give the Crown a lien in respect of the amounts collected.

The Scottish Law Commission noted a suggestion that a wider preference should be given to the Crown in respect of taxes collected on its behalf by a third party because special consideration should be given to the apparent fiduciary relationship created in such cases.[21] They pointed out, however, that the general rule is that claims for trust funds which have been mixed enjoy no such preferential ranking and concluded that:[22]

> If Revenue as a matter of policy, choose to turn employers into collectors of these imposts, we do not see why the position should, for the Revenue, be different from that of any other principal whose insolvent agent has failed to account to him in whole or in part.

The position of a principal in such circumstances has been explained as follows:[23]

> The basic rule is that property held by the bankrupt the legal title to which is in his principal, and property held by him in trust, or as a fiduciary, is not liable to be seized: this extends to property that can be traced at law or in equity. But once the property can no longer be traced, the principal becomes an ordinary creditor with the rest.

The Australian Committee also noted that the relationship which exists as a result of this system of tax collection could be regarded as being one of principal and agent rather than one of trustee and *cestui que trust*.[24] It was the conclusion of the Committee that priority in respect of these claims should be abolished.[25]

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[21] Scottish Law Commission, Memorandum No. 16, Insolvency, Bankruptcy and Liquidation in Scotland, (1971) at 42.

[22] *Ibid. See also* the subsequent Report of the Scottish Law Commission, Report on Bankruptcy and Related Aspects of Insolvency and Liquidation, 1982, 222.

[23] Bowstead on Agency (13th ed. 1968) 365.

We agree that technically various statutory trusts and deemed trusts might be characterized as legal fictions, but do not believe that this, of itself, justifies their abolition. Whether or not an agent holds in trust money that he has collected on his principal's behalf is a question of fact depending upon the terms upon which he receives the money. The law in this regard was neatly summarized by Morden J.A. in the decision of the Ontario Court of Appeal in *H.E.P. Commission* v. *Brown*,[26] as follows:[27]

> It is trite law that an agency relationship is a fiduciary one which imposed upon an agent many well defined duties in his dealings with and on behalf of his principal. But this description does not mean that in every situation where an agent collects money, he is a bailee or trustee of the bills and specie or a trustee of the money in his possession or deposited in his bank. In *Henry* v. *Hammond*, [1913] 2 K.B. 515, Channell, J., said, at p. 521
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>> It is clear that if the terms upon which the person receives money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his *cestui que trust*. If on the other hand he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases and when called upon to hand over an equivalent sum of money, then in my opinion, he is not a trustee of the money. All the authorities seem to me to be consistent with that statement of the law.
>
> Macaulay, C.J., made the same distinction in *Gore Bk.* v. *Hodge* (1852), 2 U.C.C.P. 359, when he said, at p. 368
>
>> In ordinary agency transactions the agent is looked upon as only liable to account for what I call money of account, as distinguished from any specific coins or other current money he may have actually received; he is not expected to pay over the identical money, but becomes indebted in a sum equal to the amount; but it is otherwise in the case of servants, clerks and others, who, by fraudulently misapplying the moneys received, may be guilty of embezzlement, etc.; and there may be special agencies wherein the agent receives the moneys from or for the principal, to hold in the nature of a bailee until applied to the special objects or purposes for which it was entrusted to him. In such transactions he is not at liberty to treat the specific money as his own, but should keep it, subject to the order of the owner, or dispose of it only in accordance with the authority specially given to him; and it is his duty to be at all times prepared to pay it over upon demand, in the absence of any specific appropriation or peculiar duty or direction in relation thereto.
>
> I refer also to *Bickle* v. *Matthewson* (1886), 26 U.C.Q.B. 137.
>
> In the case at bar there is no evidence that it was a term of the defendant's employment that he should keep the moneys he collected separate from his own. The letter appointing him agent does not touch the point.
>
> An agent has been held to be a trustee of moneys he has received from or for his principal where he is specifically instructed to keep such moneys separate as in *N. Elevator Co. v. Western Jobbers* (1914), 20 D.L.R. 889, affirmed (1915) 24 D.L.R. 605. The result is the same where the agent is to hold the money and invest it or manage for his principal as in *Burdick v. Garrick* (1870), L.R. 5 Ch. 233, *Coyne v. Broddy* (1888), 13 O.R. 173, 15 A.R. 159 and *N. Am. Land & Tbr. Co. v. Watkins*, [1904] 1 Ch. 242. On the other hand and in constrast, where the sole duty of the agent with respect to the money is to pay it to his principal, the relationship between the parties is that of debtor and creditor: *Friend v. Young*, [1897] 2 Ch. 421, *Henry v. Hammond*, *supra*, and *M.A. Hanna Co. v. Prov. Bk.*, [1935] S.C.R. 144.

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[24] Senate Standing Committee on Constitutional and Legal Affairs, Report on Priority of Crown Debts, Parliamentary Paper No. 169/1978 at 54.

[25] *Ibid.* at 57.

[26] [1960] O.R. 91.

[27] *Ibid.* at 93-94.

Whether or not an agent is a trustee therefore turns upon the terms upon which he is to hold money collected on behalf of his principal.

This was illustrated recently in the case *Coopers Lybrand Ltd.* v. *H.M. The Queen in Right of Canada.*[28] This case concerned the distribution of proceeds by a trustee in bankruptcy between a secured creditor, the Federal Crown for monies withheld under the *Unemployment Insurance Act* and the *Canada Pension Plan Act*, and the Provincial Crown in British Columbia for monies collected under the *Social Service Tax Act*. Each of these statutes provided that amounts that ought to be withheld or collected are "deemed" to have been held in trust. The question in issue was whether in any bankruptcy a claim for money "deemed" by statute to be held "in trust" for the Crown, rather than simply secured by a statutory lien or charge, had priority over secured creditors and any creditor ranked over the Crown in the scheme of distribution under section 107 (1) of the *Bankruptcy Act*. Mr. Justice Taylor noted that as a result of the decision in *Re Bourgault*, section 107 (1) (j) of the *Bankruptcy Act* effectively destroys the statutory liens in favour of the Crown in the event of bankruptcy. He therefore had to consider whether the section and section 107 (1) (h) would also strike down any statutory trust in favour of the Crown. He said that the rationale of the decision suggests, at least, that statutory trust provisions do not supersede section 107 of the *Bankruptcy Act*. He then said:[29]

> But I think that any over-riding effect of the intention of equal ranking of the Crown claims found in section 107 would have to be limited to those Crown claims which, but for the attempt to gain special statutory priority, would have fallen within the section. Where money or other property can be shown to be held by the bankrupt in trust for the Crown within the ordinary rules of law or equity (that is to say without the necessity of a statutory "deeming") I cannot conceive that it changes character and becomes "property of the bankrupt" under section 107.
>
> A distinction must, I think, be drawn between what may be called "true" trusts and mere "artificial" statutory trusts, in order to give rational effect to the intention of the *Bankruptcy Act*, as now declared by the Supreme Court of Canada, in this rather different context.
>
> Within the term "artificial trusts" I would include mere "deemed" trusts, which can be supported only by bare statutory assertions. By "true trusts" I mean those which may be recognized by virtue of the function performed by the bankrupt under the statute in question, or of other circumstances which would normally be taken to characterize, or give rise in law or equity to, the relationship of trustee and *cestui que trust*.

He then went on to consider whether Federal Statutes creating mere "artificial" or "deemed" trusts effectively alter, or over-ride, the intention of the *Bankruptcy Act* that debts to the Crown be uniformly ranked. Both the *Canada Pension Plan Act* and the *Unemployment Insurance Act* require an employer to deduct from an employees wages an amount in respect of contributions required under those statutes. The employee is paid his full wage less what the employer is required to "deduct" for the Crown and the employer becomes liable to pay the balance to the Crown, rather than to the employee. Mr. Justice Taylor found that the effect of the statutes was to assign to the Crown a portion of an ordinary debt due to the employee. The employer may, of course, "hold" that portion "in trust" for the Crown if he in fact sets the money aside for that purpose. But where the employer makes no allocation of money to the Crown, Taylor J. could not understand how, but for the statute, the employer could possibly be a trustee of that amount. At common law and in equity he would simply be a debtor as to the portion of the wages assigned to the Crown as he would otherwise have been a debtor to the employee as to that amount. He concluded:[30]

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[28] (1981) 39 C.B.R. 247 (B.C.S.C.).

[29] *Ibid.* at 253-254.

> But for the statutory "deeming" process it could not possibly be said that a trust would arise where an employer has failed to set aside for the Crown monies which he is required to "deduct" from the wages of the employees. The process of "deduction" serves only to reduce the amount paid to the employee, making the balance payable to the Crown, and cannot, of itself, create any fund to which a trust obligation could attach.

In considering the *Social Service Tax Act*, however, he noted that it deals with an entirely different sort of transactions. The monies in question are monies collected on behalf of the Crown by the seller of personal property from the purchaser, the latter being the person obligated to pay the tax. While there is no requirement that the seller keep the money collected separate and apart from his own, the relationship in this case is one which could give rise to a trust obligation in law or equity. There is no need for "deeming" in order to make that possible. He went on to say:[31]

> While it is clear from the *Rainville [Re Bourgault]* decision that the lien imposed by the *Social Service Tax Act* can no longer avail the provincial Crown on a bankruptcy, I conclude that funds in fact received by the bankrupt under that Act are received by it in trust on behalf of the Crown, and that the declaration of trust contained in that statute, being a fair characterization of the relationship between bankrupt and the Crown, accordingly will not offend the *Rainville* rule. The declaration of trust is not a mere statutory device conflicting with the intent of section 107 of the *Bankruptcy Act*.

Mr. Justice Taylor referred to the Court of Appeal's decision in *Re Queen* v. *Lega Fabricating Ltd.*[32] where the statutory trust provision under the *Social Service Tax Act* was also considered. In that case Carrothers, J. A. made the following statement:[33]

> It is to be noted that the purported trust in favour of the Crown relates specifically to tax collected. One of the three fundamental certainties of a trust is that the subject matter of the trust must be certain. In my opinion, despite the purported constitution of the tax collector as holder of a specific trust for the Crown, the subject matter of the trust, namely the tax actually collected, need not under the statute be kept separate and distinct by the collector and the trust loses its essential attribute or character of certainty when the collected tax is intermingled in the general assets of the tax collector and is no longer traceable or identifiable. Consequently, the Crown's claim cannot be founded in trust.

Mr. Justice Taylor said that this observation supported the view which he expressed in seeking to draw a distinction between "real" and "artificial" statutory trust provisions. He said it is plain that without an identifiable fund of money there cannot in law be an enforceable trust. For there never is in any certain subject matter to which the obligations for a trust relationship may attach. He also said, however, that the *Lega* decision seems to make it plain that money received by a seller as tax payable by a purchaser under the *Social Services Tax Act* is at that point, trust money, and provided that it is kept separately, or, if not so kept, is capable of being traced, may be claimed as such by the Provincial Crown in priority to the claims of secured creditors. Mr. Justice Taylor summarized his conclusions as follows:[34]

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[30] *Ibid.* at 255.

[31] *Ibid.* at 256.

[32] (1980) 29 B.C.L.R. 161 (B.C.C.A.).

[33] *Ibid.* at 164.

[34] *Supra*, n. 28, at 261-262, the extent to which the Crown could "trace" the funds received was determined in "Supplementary Reasons," *see* (1982) 129 D.L.R. (3d) 597.

1. From the strong statement of parliamentary intent contained in the decision of the Supreme Court of Canada in *Deputy Minister of Revenue* v. *Rainville (Trustee of Bourgault)* [1980] 1 S.C.R. 35 I have concluded that, in a bankruptcy, the provisions of section 107 of the *Bankruptcy Act* as to the ranking of Crown claims are to prevail wherever there is conflict between the policy embodied in the section, as declared in that decision, and the provisions of statutes which purport to give Crown claims any higher priority by creating "deemed" trust obligations.
2. Because section 107 (1) (h) refers to obligations created by specific federal statutes which in fact impose "deemed" trust obligations, I have concluded that all "deemed trust" obligations, even though federally created, are to be ignored in the distribution of assets on a bankruptcy [the claim in question being dealt with under section 107 (j) if not specifically mentioned in paragraph (h)] unless the statute concerned was enacted in time *after*, and contains specific reference to, section 107. Such "deemed" trust provisions, without specific reference to the *Bankruptcy Act*, are not to be taken as creating exceptions to the over-riding policy concerning the ranking of Crown claims which the Supreme Court of Canada has found to be expressed in section 107.
3. On the other hand, where the relationship established by a charging statute, provincial or federal, is such that a trust obligation in favour of the Crown may arise under the ordinary rules of law or equity, section 107 will not destroy that trust. The property held in trust (whether in its original form or in a substituted form to which the trust may be attached by the process of "following" or "tracing") is the property of the Crown as *cestui que trust* and section 107 does not go so far as to transform it into property of the bankrupt to be distributed to other creditors.
4. In the case of money required by statute to be "deducted" or "withheld" by an employer from wages employees but never in fact allocated to, or set aside, for the Crown, there is never any subject matter to which a trust could attach, and it follows that a statutory provision "deeming" such money to be kept separately (like a statute establishing a lien or charge in favour of the Crown) will not take the claim out of section 107 (1) and give it any higher position. In the case of any *Workmen's Compensation Act* or *Unemployment Insurance Act* and in the case of the *Income Tax Act* this is stated expressly by section 107 (1) (h) and in the case of other such statutes it is to be inferred from the wording of paragraph (j), read in the light of the intent of the whole section as now declared in the *Rainville (Bourgault)* decision.
5. In the case of money in fact set aside for the Crown under such statutes, however, and in the case of money actually received on behalf of the Crown by a person required to collect tax from a taxpayer under statutes such as the provincial *Social Services Tax Act*, who later becomes bankrupt, the claim of the Crown to the money collected does not rest on a mere statutory devise calculated to defeat the intention of section 107. Such money (so long as it can be identified, followed or traced into property which falls into the hands of a trustee in bankruptcy) may be claimed as property of the Crown, in priority to all claims on the property of the bankrupt, secured or otherwise.

Abolition of a statutory provision impressing with a trust monies collected on behalf of the Crown, would not necessarily mean that a trust does not in fact exist. In this instance we do not believe it objectionable for the Legislature to provide specifically that such sums are to be held, or deemed to be held, in trust, and therefore do not recommend that these provisions be abolished.

We do object, however, to the provisions in some statutes, namely section 18 (b) of the *Social Service Tax Act* and section 16 (b) of the *Hotel Room Tax Act*, which provide that tax collected on behalf of the Crown, in addition to being deemed to be held in trust, is deemed to be held separate and apart from and forms no part of the collector's estate, whether or not it has in fact been kept separate and apart. These provisions can create some confusion for, as we noted in Chapter VII, while they would not give the Crown any advantage in the case of a bankruptcy, it is arguable that they would improve the Crown's position in insolvencies not amounting to a bankruptcy as they might obviate the necessity for the Crown to follow the rules as to tracing. The Crown has therefore created for itself a security interest in the property of its tax collectors which is tantamount to a lien and which places it in a far more favourable position than other beneficiaries of a trust. Insofar as the Crown asserts that the amounts collected are trust monies, we believe it should be obliged to follow the same rules as to tracing as any other beneficiary of a trust, and, therefore, recommend repeal of these two sections.

The Commission recommends that:

3. Section 18 (1) (b) of the Social Service Tax Act *and section 16 (1) (b) of the* Hotel Room Tax Act *be repealed.*

We have also concluded that there are no factors peculiar to these types of claims that justify the preferred position of the Crown created by the statutory liens, and that for the reasons advanced in Chapter V in favour of abolition of a general right in the Crown to prior payment, the liens given in respect of these claims should also be abolished. Thus the Crown's right to recover in respect of these debts should depend on its ability to trace as a *cestui que trust*, or, if it has reduced its claim to a "judgment," its ability to enforce that judgment to the same extent as any other judgment creditor.

We should point out that we are currently examining the law relating to tracing in a study on rights to mingled property, and expect to issue a Working Paper on the subject shortly. The limitations faced by the Crown and other beneficiaries of a trust may well be mitigated if the proposals under consideration emerge as the Commission's final recommendations and are adopted by the Legislature. Put shortly, the burden faced by the Crown or any other beneficiary will be lightened considerably.

The Commission recommends that:

4. The liens created in respect of amounts collected on behalf of the Crown and contained in the following statutory provisions, be repealed:

- *(a) section 16,* Hotel Room Tax Act;
- *(b) section 18,* Social Service Tax Act;
- *(c) section 15,* Tobacco Tax Act;

3. CONSEQUENTIAL REFORM

In the various taxation statutes that create liens in favour of the Crown, it is also usually provided that where a receiver and the like is in control of a taxpayer's property, he cannot distribute any of that property until he has obtained a certificate that there are no unpaid taxes outstanding. Indeed under sections 18 (4) and (5) of the *Social Service Tax Act*, and sections 16 (4) and (5) of the *Hotel Room Tax Act*, which are almost identical in both statutes, personal liability is imposed upon persons such as receivers, liquidators, etc. in respect of taxes that should have been collected and remitted to the Crown. Sections 18 (4) and (5) of the *Social Service Tax Act* provide:

> (4) A person who, as assignee, liquidator, administrator, receiver, receiver manager, trustee or other like person, other than a trustee appointed under the *Bankruptcy Act* (Canada), takes control or possession of the property of a person who has collected or is required to collect the tax under this Act shall, before distributing the property or the proceeds from the realization of it under his control, obtain from the commissioner a certificate that the tax collected by that person in the year immediately preceding the date when that person lost control or possession of his property and not remitted by that person as required by this Act has been paid or that security acceptable to the minister has been given.
>
> (5) An assignee, liquidator, administrator, receiver, receiver manager, trustee or other similar person, other than a trustee appointed under the *Bankruptcy Act* (Canada), who distributes property referred to in subsection (4) or the proceeds of the realization of it without having obtained the certificate required by that subsection is personally liable to the Crown for an amount equal to

> (a) the amount of tax that was collected by the person referred to in subsection (4) in the year immediately preceding the date when that person lost control or possession of his property and not remitted to the Crown; or
>
> (b) the amount of tax that was required to be collected,
>
> whichever is the greater.

Thus, a receiver, for example, has to obtain a certificate that all taxes collected have been remitted or that acceptable security has been given. Failure to do so renders him personally liable. The apparent effect of these provisions is to force a receiver, even where an estate is insolvent, to remit the total amount owing to the Crown, notwithstanding that there might be other creditors who have priority over the claim of the Crown. In such a case a receiver might incur a personal liability to the extent that such creditors have been prejudiced by any payment to the Crown. We believe that this apparent effect is unjust and that it may put a receiver and the like in a "damned if he does and damned if he doesn't" dilemma which would be exacerbated if the liens in respect of these taxes are abolished. We therefore recommend that these sections be repealed so as to eliminate this possibility of such persons being faced with this dilemma.

We note that a similar duty is imposed upon receivers and the like under section 22 of the *Corporation Capital Tax Act*,[35] and in other taxation statutes,[36] although the relevant provisions do not provide specifically that a receiver is personally liable for any unpaid taxes.[37] If, as we have recommended, the various liens under these statutes are abolished, these provisions should also be repealed.

The Commission recommends that:

5. Sections 18 (4) and (5) of the Social Services Tax Act *and sections 16 (4) and (5) of the* Hotel Room Tax Act *be repealed.*

4. RESOURCE RENTS

As we pointed out earlier, there is a theoretical difference between a "resource rent," whether it be termed a royalty or stumpage, and a tax levied on profit. A resource rent is in effect the price paid for a supply of raw materials such as timber or coal.[38] The question therefore arises whether the Crown should continue to enjoy any preferential treatment in securing payment for the raw materials supplied. It is the conclusion of a majority of the Commission that it should, and that the lien provisions in both the *Forest Act*[39] and the *Coal Act*[40] should remain unchanged. It is the view of one member of the Commission, however, that these liens should be abolished as, in his view, they seek to secure the payment of a tax rather than a royalty.

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[35] R.S.B.C. 1979, c. 69. The section provides:

> **22.** Every trustee in bankruptcy, assignee, liquidator, receiver, administrator and other person administering, managing, winding up, controlling or otherwise dealing with the property or business of a corporation
>
> (a) shall make the required return and pay the tax within the time limited in section 21 or make the instalment payments under section 21.1; and
>
> (b) before distributing any assets under his control, shall obtain a certificate from the commissioner certifying that no unpaid tax chargeable against the corporation is outstanding.

[36] *Mining Tax Act*, R.S.B.C. 1979, c. 267, s. 17; *Logging Tax Act*, R.S.B.C. 1979, c. 248, s. 17; *Mineral Resource Tax Act*, R.S.B.C. 1979, c. 263, s. 18; *Insurance Premium Tax Act*, R.S.B.C. 1979, c. 205, s. 18.

[37] The equivalent of section 22 was considered in *Re Bob's Power Demolition* (Unreported, September 1, 1976, Vancouver Registry No. A761066 (B.C.S.C.)). In that case there was not enough property to satisfy all the charges that had priority over the claim for corporation capital tax. In the light of this, it was held that a receiver was not required to obtain the certificate before distributing assets in order to satisfy claims secured by charges that ranked ahead of the claim for corporation capital tax. The court imposed this restricted meaning on the word "distributing" to "prevent an unjust and absurd result." The court noted that if "distribute" was given its widest meaning then the priority given in the statute to registered charges would be rendered nugatory. *See also Sigurdson* v. *H.M. The Queen*, (1982) 33 B.C.L.R. 190 (B.C.C.A.). Whether, in the light of the strong and explicit wording in sections 18 (4) and (5) of the *Social Services Tax Act*, and sections 16 (4) and (5) of the *Hotel Room Tax Act*, a court would similarly limit the effect of these sections is debatable.

[38] *See, e.g., In Re Abernethy-Lougheed Logging Co.*, [1938] 1 W.W.R. 544 (B.C.S.C.) per Murphy J. at 550, and [1940] 1 W.W.R. 319 (B.C.C.A.) per Sloan J.A. at 333.

[39] R.S.B.C. 1979, c. 140, s. 141.

[40] R.S.B.C. 1979, c. 51, s. 29.

The majority believe that the preferential treatment of the Crown in this regard can be supported for a number of reasons. First, as already mentioned, the character of the Crown's claim in respect of resource rents differs from a claim for unpaid taxes. It is directly related to the supply of tangible property that was originally vested in the Crown. It is not unreasonable commercially, for a supplier to take some form of security in order to secure payment for material supplied, whether the supplier is the Crown or a private individual. Although the Crown in this instance has sought to protect itself by statute rather than by way of agreement, the type of security created in its favour does not, in the circumstances, appear to us unreasonable. The lien provisions in both the *Forest Act* and the *Coal Act* are more limited than those created to secure the payment of unpaid taxes. They are limited both in respect of the property to which the lien may attach, and the degree of priority given over other claims. In particular, they do not attach to real property, and insofar as they attach to the personal property of a debtor, they are subordinated to prior registered liens, charges or encumbrances.

The majority recognizes that its conclusions in respect of the preferred position of the Crown in respect of resource rents run counter to the philosophical proposition that in general the interests of the Crown should not *per se* be preferred over those of a private citizen. As was stated earlier, however, there might be particular circumstances in which priority for the Crown is justified. For the reasons stated above, the majority believes that the preferred position of the Crown in respect of amounts payable as resource rents is one of those particular circumstances.

We noted earlier that under the proposed *Bankruptcy Act*, liens in favour of the Crown might maintain their priority if they are registered in a public registry. We therefore suggest that it might be advisable for both the *Forest Act* and the *Coal Act* to be amended so as to permit registration of their respective liens. Upon enactment of the *Bankruptcy Act* the Crown would then be in a position to avail itself of the protection afforded Crown liens under that Act.

E. Claims by the Crown for the Benefit of Others

1. EMPLOYMENT STANDARDS ACT

The provisions of section 15 of the *Employment Standards Act*,[41] illustrate the conflict that exists between two ostensibly desirable goals, namely the protection of the unpaid worker and maintaining the integrity of the land registry system. As a matter of policy, the legislature has decided that it is important to maintain the integrity of the Torrens' system, recognizing that this might lead to claims of unpaid workers being postponed to mortgages registered prior to such claims being perfected. In a debate in the Legislature an opposition member expressed the following concerns about the effect of section 15 (3):[42]

> What the minister has done in this particular statute is to enshrine what is known as the *Homeplan* decision, whereby employees—under one section of this bill, where there is land and a mortgage involved—do not have first call on the moneys that are left following a receivership or bankruptcy. I know the two are different and one is federal and so on, but that's a whole other issue. But I do want to bring this to the attention of the minister during second reading. It is essential, in my

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[41] *Supra*, n. 12.

[42] Debates of the Legislative Assembly, August 19, 1980, 4025.

> view, that the wages of employees come first. They are the ones who put out the work and effort, have families to feed, mortgages to meet, car payments and all of these other things. For them not to have first claim is an error. That *Homeplan* decision, I know, was a Supreme Court decision, but it was based more on inadequate wording in the previous statute than on the concept that employees' wages should come second. It's a mistake, Mr. Speaker, and I'm hopeful that the amendment that I have introduced on the order paper will be accepted by the minister.

In reply, the then Minister of Labour said:[43]

> I appreciate the comments about the *Land Registry Act*. It was a policy decision, and one that was fundamental. That was the protection of the existing Torrens system. I note that Manitoba has just gone back to using the system, respecting the sanctity of it. I appreciate the concerns they have; I also have those concerns. But I might mention that I am trying to come up with an idea to try to address that particular problem in another way.(44)

Despite the limitation in section 15 (3), the priority accorded the claims of unpaid employees gives those claims a degree of protection that is not enjoyed by any other creditor. Various reasons can be advanced in support of this position. It can be argued, for example, that of all creditors employees are the least able to protect themselves. They are paid in arrears and, in a sense, are extending credit involuntarily without the benefit of any security device. It is also unreasonable to expect the vast majority of employees to know anything about their employers' degree of solvency. Finally, it is probable that employees are least able to bear any loss arising out of employers' insolvency. As one commentator has noted:[45]

> In general, unpaid employees cannot meaningfully compete with their employer's business and consumer creditors. In order to compensate for this vulnerability, wage creditors need fast and inexpensive legal remedies against employers, and priority in payment over other creditors.

The degree of protection afforded unpaid employees is achieved at the expense of other creditors, even those who have sought to protect themselves by taking security before a claim for unpaid wages arose. Thus, a chattel mortgagee, for example, becomes, in effect, an insurer of the employer's payroll. The legislature was obviously alive to this issue but took the view that the need to protect unpaid wage earners is paramount.

We recognize the need to protect wage earners and that the lien can prove effective in this regard. On the other hand we can sympathize with the secured creditor who perfected his security prior to the time that the lien for wages arose, but who ranks behind the claim for unpaid wages. Indeed, it is not inconceivable, for example, that his extension of credit enabled the employer to remain in business, and therefore provide jobs which otherwise would not be available. Now that there is the possibility of the creditor's claim being postponed in favour of unpaid wages commercial financing may be inhibited, particularly in labour-intensive industries.

In its recent Report, the Committee on Wage Protection in Matters of Bankruptcy and Insolvency rationalized the need for some form of protection as follows:[46]

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[43] *Ibid.* at 4034.

[44] We assume that the Minister's reference to Manitoba relates to the amendments to that province's *Payment of Wages Act* 15 S.M. 1975, c. 21, enacted in 1979, see S.M. 1979, c. 49, s. 10. Apart from the *Employment Standards Act*, wages of employees are also given some protection in a variety of statutes which provide for the distribution of a debtor's assets, or the proceeds thereof, among his creditors, *see, e.g. Creditor Assistance Act*, R.S.B.C. 1979, c. 80, s. 36; *Court Order Enforcement Act*, R.S.B.C. 1979, c. 75, s. 46; *Company Act*, R.S.B.C. 1979, c. 59, s. 95, *Estate Administration Act*, R.S.B.C. 1979, c. 114, s. 114 (2); *Sale of Goods in Bulk Act*, R.S.B.C. 1979, c. 371, s. 7 (2).

[45] D. Zatzman, *The Unpaid Employee as Creditor: Case Comment on Homeplan Realty*, (1980) 6 Dal. L.J. 148, 150.

[46] *Supra*, n. 7.

> 2.1.01 The concept of wage protection in bankruptcy and insolvency likely arose because of essential differences between employees and other creditors of a bankrupt. Basically these differences stem from the fact that the other creditors are better structured to absorb losses as an undesirable but necessary risk in providing goods or services with a view to making a profit. In its *Report*, the *Study Committee on Bankruptcy and Insolvency Legislation* emphasized this basic difference between a person in business and an employee:
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> > . . . it is relevant to recall that bad debts are anticipated by those in business. A reserve or allowance is made for bad debts as a cost of doing business. This reduces the income tax payable by the credit grantor and has the effect of distributing losses over all of the tax-paying public.
>
> 2.1.02 For employees, their jobs are their chief and, perhaps, only source of income. While profit sharing or stock option plans for employees exist in some cases, they are more related to job incentive objectives and wage diversification packages and do not, ordinarily, render those employees partners or co-owner of the commercial enterprise with its accompanying risks.
>
> 2.1.03 The ability of some employees to negotiate better wage packages has increased enormously over the years as a result of collective representation. However, unlike some large creditors, those employees, customarily, are not able to obtain protections to assure the payment of the negotiated wages and benefits by requiring, for example, a property security interest or the posting of a bond.
>
> 2.1.04 In contrast to all other creditors, employees have little or no access to information regarding the financial affairs of their employer. Particularly, on the eve of the insolvency, they are often guided by rumours and assurances as to the reason for tardy pay cheques. These assurances often result in employees "carrying" their employers longer than other creditors, albeit in the hope of protecting their own livelihood.
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> 2.1.05 Furthermore, where bankruptcy or insolvency occurs, many employees are less likely than commercial creditors to know their rights or have the resources to enforce them.
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> 2.1.06 Finally, delays in recovery of wages, let alone the lack of its certainty, has a greater impact on employees than on commercial creditors. A delay in payment is unlikely to be offset by another source, especially when it occurs during a period in which the employee is unemployed and trying to qualify for a support payment.
>
> 2.1.07 For these reasons, the Committee adheres completely to the declared federal objectives that employees' wages deserve special treatment and better protection, especially in view of the relatively recent developments in the Canadian economy which have added new dimensions to the problem of unpaid wages.

We have concluded that, subject to one reservation, unpaid wage earners need the protection they currently enjoy by virtue of the *Employment Standards Act*. The recent amendments have clarified some of the more troublesome aspects of the former provisions, and the fact that these provisions have been the subject of recent legislative action has persuaded us that it would be inappropriate to propose major changes before there has been some experience with the operation of the new provisions. Experience with the legislation may suggest a need to protect third parties who have a security interest in the employer's personal property. If this is the case, the proposal we make later in respect of the priority of the lien under the *Workers Compensation Act* vis-a-vis security interests in personal property, might be adapted to meet this exigency.

Our reservation concerns the extent to which the lien may attach to the property of directors and officers of corporate employers. We express no opinion on whether or not directors should be personally liable for unpaid wages and the scope of the summary remedies available to the Director of Employment Standards to collect such wages from a director. We are opposed, however, to a director's property being impressed with a lien under section 15. Unlike the creditors of an employer, the creditors of a director are probably unaware that their claims may be postponed in favour of the lien. They may not even be aware that an individual is a director or officer of a corporate employer. Even if they were, except for mortgagees of land, they have no effective way of protecting their interests. Credit may even have been extended to an individual when he was not a director. For example, A may buy a car, the purchase money for which is supplied by B and which is secured by way of a chattel mortgage. Subsequently A becomes a director of C Ltd., a company with several employees. C Ltd. fails to pay its employees and the Director of Employment Standards issues a certificate naming A as owing wages. As a result of section 15 (1), the amount owing would form a lien on all the real and personal property of A ranking ahead of B's chattel mortgage. In the result B, could lose all or part of his security.

It is our conclusion that the potential for such a manifestly unfair result calls for the elimination of the lien insofar as it attaches to the property of a director or officer of a corporation. We are of course alive to the fact that the current provisions may have been designed to meet the situation where a corporate employer nominally owns very few assets, the bulk of the assets being "owned" by directors and shareholders. It could therefore be argued that limitation of the lien may encourage such practices. If this should occur and becomes a common problem then appropriate measures may be required to deal with such situations. A possible approach might be that adopted in section 52 (2) of the *Workers Compensation Act*, where the lien under that Act attaches to the property of directors, managers or other principals of a corporate employer if that property is used in, or in connection with the industry with respect to which the employer was assessed. It is our view, however, that a similar provision should not be incorporated in the *Employment Standards Act*.

The Commission recommends that:

6. Section 19 of the Employment Standards Act *be amended by the addition of the words "except the provisions of section 15" after the words "this Act applies."*

It is pertinent to note that the protection afforded wage earners under the *Employment Standards Act* is greater than that afforded them under the current *Bankruptcy Act*[47] and the proposed *Bankruptcy Act*.[48] As we mentioned in Chapter VII, it has been held by the British Columbia Court of Appeal that in the event of an employer's bankruptcy, the effect of section 107 (1) (j) of the *Bankruptcy Act* is to deprive the Board of Industrial Relations of the right to rank as a secured creditor, notwithstanding that it is the holder of a lien under the *Employment Standards Act*.

Under both the present and the proposed *Bankruptcy Act*, however, wage earners are given a preference but only over general creditors and only up to limited amounts. In a recent Report by the Senate Standing Committee on Banking, Trade and Commerce, dealing with the current proposed *Bankruptcy Act*,[49] it was recognized that the degree of protection given to wage earners in the event of their employer's bankruptcy is unsatisfactory. It was the Committee's conclusion, however, that rather than giving wage earners a higher priority, protection for wage earners would be better achieved through the creation of a "Wage Earners Protection Fund" from which wage claims of unpaid employees of a bankrupt company would be paid. The Committee envisages that the Fund would be self-sustaining, maintained by monthly contributions from all employers in Canada based on the number of their employees.

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[47] R.S.C. c. B-3.

[48] Bill C-12, April 16, 1980.

[49] Standing Senate Committee on Banking, Trade and Commerce, Report on the Subject-Matter of Bill C-12, "An Act Respecting Bankruptcy and Insolvency," July 6, 1980.

In 1975, the same Committee had made a similar suggestion in a Report on proposed Bill C-60, the original in the series of bills relating to a new *Bankruptcy Act*. Bill C-60 provided that a claim for wages up to a maximum of $2,000.00 would be entitled to be paid in full out of the assets of a bankrupt in priority to the claims of all secured creditors. The Committee was of the opinion that a Wage Earner's Protection Fund could better protect wage earners and recommended that the provisions giving wage earners priority over secured creditors should be deleted. In its 1980 Report, the Committee drew attention to the fact that the latter recommendation was adopted but that no provision was made for a wager earners' protection fund. We are of the view that the Committee's proposed wage earners' protection fund is a possible alternative to giving wage earners priority over secured creditors. If the establishment and operation of such a fund is feasible on bankruptcy, we would suggest that it might possibly be a way of ensuring that wage earners are protected in the event of their employer's insolvency in circumstances not amounting to bankruptcy. The creation of such a fund would eliminate the need for the type of lien provided for in the *Employment Standards Act*.[50]

2. WORKERS COMPENSATION ACT[51]

The purpose of the Board's lien has been described as:[52]

> . . . to make possible the prompt collection of assessments for the Accident Fund, out of which compensation is paid to injured workmen and the dependents of workmen who lose their lives in industry.
>
> From any mutual insuring group or class of employers under the Act an amount must be collected sufficient to meet the accident cost of the class. If any employer in that class fails to pay his share of the total assessment, the remaining employers who have already paid their assessments must meet the deficiency. Any provision which would render the collecting of assessments more difficult would have the tendency (by an increase in those assessments) to put an unfair burden on employers who pay their assessments promptly.
>
> The Board cannot select its risks. Every employer in the industries covered is automatically required to pay assessments regardless of his financial reliability. Commercial houses selling to industrial operators can choose their customers and select only those whom they consider as good credit risks. Those employers who are members of credit bureaux have at their disposal the necessary facilities to ascertain the financial responsibility of potential and other customers. The Board is not in that favourable position and consequently has been given special collection procedure by way of filing a certificate in Court and issuing a warrant of execution. Similar procedures are set out in other Workmen's Compensation Acts throughout Canada. The collection provisions in the *"Forest Act"* and *"Social Security and Municipal Aid Tax Act"* are comparable with those under the *"Workmen's Compensation Act."*

The common view appears to be that the financial interests of employers who meet their obligations are, to some extent, protected by the existence of the lien. It was on this basis that the Board, before a Commission of Inquiry conducted by Mr. Justice Tysoe in 1966,[53] made a general request for broadening the scope of its lien. In his Report, Mr. Justice Tysoe noted that:[54]

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[50] *See* D. Zatzman, *supra*, n. 47 at 186–189.

[51] R.S.B.C. 1979, c. 437.

[52] Report of the Commission of Inquiry on the *Workmen's Compensation Act* and Board, 1952, per Sloan C.J. at R210-R211.

[53] Commission of Inquiry, *Workmen's Compensation Act*, 1966.

[54] *Ibid*. at 430-431.

> In support of its request for a lien of a wider scope than it now has, the Board gave examples of companies which are devoid of assets operating with equipment owned by shareholders and their wives, and the difficulties that face the Board in collecting its assessments in such cases. It pointed out that other employers have to make up the assessments that turn out to be uncollectable.

It was contended on behalf of employers, however, that the benefit that would accrue to them as a group would be more than outweighed by what they regard as a wrong done to third parties. Mr. Justice Tysoe agreed with this view and did not recommend that the Board's request in this regard be granted.[55] It should be noted that under the current Act, however, "property" of an employer that is a corporation is deemed to include the property of any director, manager or other principal of the corporation where it is used in connection with the industry.[56]

Mr. Justice Tysoe did accede to a Board request, in the absence of any objections, that the lien should continue for more than three years, and recommended that the period be extended to five years. This is now the period for which the lien survives under the current section.[57]

The duration of the lien was also considered during an earlier Public Inquiry conducted by Chief Justice Sloan in 1952.[58] In a submission made on behalf of the Canadian Credit Men's Trust Association Limited, it was suggested that the duration of the lien, then three years, be reduced. Mr. Justice Sloan did not accede to this request. In fact, the three year limitation had been introduced as a result of a recommendation made by him in 1942. He noted that:[59]

> It was not without some hesitation in 1942 I recommended an inclusion of the three-year limitation in the section because I was apprehensive that it might lead to difficulties of collection with the consequent increase of assessments on others in the class. The necessary funds have to come out of someone's pocket. The Board's record, however, has relieved my fears on that score. In the twenty years from 1919 to 1940, 98.26 per cent of assessments was collected. From 1946 to 1950, 99.7 per cent thereof was collected, indicating a marked degree of diligence on the part of the collection branch of the Board, and the relatively small proportion of unpaid assessments for which priority could be claimed.
>
> It must also be borne in mind that if an employer records his operation by filing an estimate of his payroll in January, 1951, the actual payrolls may not be received or audited by the Board until late in 1952, nearly two years later, and that is when his real position is definitely ascertained.

He concluded:[60]

> After consideration of all the relevant circumstances, I do not feel justified in reducing the time limitation of three years.

The Board's lien has therefore been justified on the ground that without it the Board would not be able to collect delinquent assessments and, in consequence, the burden would fall on other employers to make up any shortfall in the accident fund. It is therefore understandable that, in the abstract, employers *qua* employers may take the view that it is in their financial interest to support the existence of the Board's lien. Whether such employers would continue to maintain that view if their claims as creditors are actually postponed to the Board's claim is debatable.

The Board's claim is of a different character than, for example, the Crown's claim for taxes. It is aimed at maintaining the liquidity of the accident fund which is used to compensate injured workers. We are of the view that the special character of the Board's claim and the purpose for which the assessments are used, justify the retention of the lien but in a modified form.

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[55] *Ibid*. at 431.

[56] *Supra*, n. 51, s. 52 (2).

[57] *Ibid*. s. 52.

[58] *Supra*, n. 52.

[59] *Ibid*. at R2ll.

[60] *Ibid*.

At the beginning of this chapter, we said that if a particular lien is justified, it should form part of a rational scheme that minimizes the danger of third parties being misled as to the existence and priority of a particular lien. We understand that the Board will on request provide information as to whether a particular employer is in arrears under the Act so that creditors, or purchasers of an employer's undertaking, have some means of ascertaining whether there is a lien outstanding against that employer. However, as the lien has priority over all liens, charges or mortgages whenever created, a creditor who secures an advance to an employer after making enquiries as to his status under the Act, might find that his security will be postponed in favour of the Board's lien if, at any time in the future, the employer falls into arrears under the Act.

It is our view that a person who seeks to protect himself by taking security should be able to rely on a public register to reveal any lien existing in favour of the Workers Compensation Board. Furthermore, we are also of the view that in principle the lien should not have priority over a lien or charge that was registered before evidence of the lien itself was registered in the appropriate registry. Insofar as the lien attaches to real property, a registration requirement similar to section 15 (3) of the *Employment Standards Act* would be the most appropriate approach. The lien would not therefore have priority over a mortgage, or debenture, charging land that was registered in a land title office before registration against that land of a certificate of judgment obtained under section 45 (2) of the *Workers Compensation Act* thus bolstering the integrity of the Torrens System.[61]

We would also recommend, however, that unlike the lien under section 15 of the *Employment Standards Act*, the lien under the *Workers Compensation Act* should not have absolute priority over further advances made under a prior registered mortgage or debenture. Under the general law, section 24 (1) of the *Property Law Act*[62] governs the priority of further advances made under a mortgage over mortgages registered subsequently. That section provides:

> **24.** (1) Notwithstanding the *Land Title Act*, after October 30, 1979, further advances made by a registered owner of a mortgage contemplated by and in accordance with the mortgage rank in priority to mortgages and judgments registered after his mortgage was registered where
>
> (a) the subsequent registered mortgagees or judgment holders agree in writing to the priority of the further advances;
>
> (b) at the time the further advance is made he has received no notice in writing of the registration of the subsequent mortgage or judgment, from its owner or holder;
>
> (c) at the time the further advance is made the subsequent mortgage or judgment has not been registered; or
>
> (d) the mortgage requires him to make the further advances.

We believe that similar principles should govern the priority of further advances made pursuant to a mortgage registered before the registration of a judgment in favour of the Workers Compensation Board under the *Workers Compensation Act*, i.e., it should be treated in the same manner as a "subsequent" mortgage or judgment under section 24 (1) of the *Property Law Act*.

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[61] In the case of a floating charge crystallization, rather than registration would still be the crucial date, *see The Queen in Right of B.C.* v. *Consolidated Churchill Copper Corporation Ltd.*, [1978] 5 W.W.R. 652 (B.C.S.C.).

[62] R.S.B.C. 1979, c. 340.

The Commission recommends that:

7. Section 52 of the Workers Compensation Act *be amended to provide that*

- *(a) the lien does not have priority over a mortgage, or debenture, charging land, registered before registration in the land title office of a judgment in favour of the Board in respect of the amount owing by an employer;*
- *(b) the priority of the lien with respect to money advanced under a mortgage, or debenture, after the certificate of judgment was registered shall be determined as if it was a "subsequent" mortgage or judgment under section 24 (1) of the* Property Law Act.

The adoption of a similar system in respect of personal property would at present be hampered by the complexity and lack of systemization of the law surrounding security interests in personal property. The law relating to secured transactions involving personal property has been studied by this Commission, and in 1975 we published a Report[63] in which legislation was recommended that would eliminate the current difficulties and rationalize the law. At present, various types of security interests are recognized by law, each shrouded with its own technical rules relating to perfection, priority and the like. In our 1975 Report we summarized the type of security interests in personal property, the registration requirements and the difficulties that exist under the present law. This summary is reproduced in Appendix D.

In our Report it was recommended that a new *Personal Property Security Act* be enacted that is comparable to those now in force in Manitoba,[64] Ontario[65] and Saskatchewan.[66] While our recommendation has not yet been implemented, we are optimistic that legislation will be enacted in the near future. In 1978 a proposed Act based on our recommendations was given wide circulation by the Ministry of Consumer and Corporate Affairs and this was followed by extensive consultation with members of the legal profession active in secured financing. We understand that the interest of that Ministry continues.

When legislation of this kind is enacted in British Columbia, there will be a single registration system and a single registry in which all security interests in personal property will have to be registered by filing a "financing statement." When a *Personal Property Security Act* is enacted, it could be provided in the *Workers Compensation Act* that the lien does not have priority over a security interest in personal property that was registered in the Personal Property Security Registry before registration in that Registry of a certificate of judgment obtained pursuant to a filing under section 45 (2) of the *Workers Compensation Act*.

We are confident that by the time that our recommendation might be implemented by legislation, a *Personal Property Security Act* will probably have been enacted. Accordingly, our recommendations for reform are predicated on that assumption. If, however, a new *Personal Property Security Act* is not enacted, we believe that a method should be found to integrate the lien under the *Workers Compensation Act* with the existing statutes and Registries that regulate the registration and priorities of the various security interests that can be created in real property. In that event we would be willing to render any assistance necessary in devising such a scheme.

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[63] L.R.C. 23.

[64] S.M. 1973, c. 5.

[65] R.S.O. 1980, c. 375.

[66] S.S. 1979-80, c. P-6.1.

The Commission recommends that:

8. Section 52 of the Workers Compensation Act *be amended to reflect the following principles:*

- *(a) To secure an amount payable by an employer to the Board, the Board has a security interest in all personal property and its proceeds that is used in or in connection with or produced in or by the industry with respect to which the employer was assessed or the amount became payable,*
  - *(i) if it is property in which the employer may create a security interest in favour of a person other than the Board, or*
  - *(ii) where the employer is a corporation, if it is property in which a director, manager, or other principal of the corporation may create a security interest in favour of a person other than the Board.*
- *(b) The priority and enforcement of a security interest arising under paragraph (a) shall be governed by the* Personal Property Security Act *as if the security interest were created consensually.*
- *(c) For the purposes of the* Personal Property Security Act, *the security interest arising under paragraph (a)*
  - *(i) attaches when a certificate is filed in a court under section 45 (2) of the* Workers Compensation Act, *and*
  - *(ii) is perfected by*
    - *(A) the Board taking possession of property, or*
    - *(B) registration, in the Central Registry, of a financing statement indicating that a certificate in prescribed form has been filed under section 45 (2).*

F. The Procedural Advantages

1. GENERAL

As we stated earlier, we believe that although certain Crown liens should be abolished, the Crown generally should continue to enjoy the procedural advantages and summary remedies provided in various statutes. We are concerned, however, that in some instances the Crown could proceed summarily without the knowledge of the debtor, whose first intimation that the Crown is enforcing its rights against him may be when he is visited by a sheriff who is seeking to levy execution of a "judgment" obtained by the Crown.

We recognize that it is difficult to conceive of a situation arising where a taxpayer, for example, does not know that he might owe money to the Crown. Indeed most of the taxing statutes provide for returns to be filed, the issue of notices of assessment and appeals where a taxpayer disputes an assessment. Furthermore, under the *Employment Standards Act*, before a "certificate" can be filed in court, an employer must first be given an opportunity to "contest" the certificate.[67]

While it is possible that a debtor may be aware that the Crown has a claim against him, he may be unaware that the Crown has taken steps to enforce this claim by the filing of a certificate which has the same force and effect as a judgment. This is because even in those statutes where the Crown is required to give notice of its intention to enforce payment, it is not required to identify the type of proceeding it intends to use to enforce its claim. Furthermore, failure to give the notice does not invalidate the enforcement proceedings. Section 39 of the *Corporation Capital Tax Act* is a typical example which provides:

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[67] *Supra*, n. 12, ss. 12 and 13, and *see Re Khan et al. and Board of Industrial Relations*, (1980) 102 D.L.R. (3d) 219 (B.C.S.C.).

> *Notice of proceedings*
>
> **39.** Before taking any proceedings for the recovery of the tax under this Act, the commissioner shall give notice to the corporation of his intention to enforce payment, but failure to give the notice does not affect the validity of any enforcement proceedings taken.

We believe that whenever the Crown or any public body is given the right to proceed to "judgment" summarily and does so proceed, at minimum it should be required to give some notice to the debtor that a "judgment" has been obtained against him.

We would therefore suggest that where the Crown intends to file a certificate, the filing of which confers upon it the status of a judgment, a copy of that certificate should be sent by mail to the debtor, and that the certificate should only be accepted for filing if it is endorsed to the effect that a copy of the certificate has been mailed to the debtor.

The Commission recommends that:

9. Where the Crown or any public body is entitled to enforce a claim for the payment of money by means of a filing that confers upon the document filed the status of a judgment, the document should only be accepted for filing if it is endorsed with a statement that a copy of the document has been sent by registered mail to the debtor at the last address for the debtor according to the records of the Crown or public body.

2. DISTRESS

We noted earlier that various statutes give the Crown a right of distress, i.e., a right to seize and sell its debtor's goods to satisfy a debt owing, to assist in the enforcement of tax obligations. In 1981 we issued a Working Paper on Distress for Rent where we examined a number of provincial enactments that created rights of distress that benefit persons other than landlords—the most frequent being those in favour of the Crown. We proposed that these be abolished. We issued a final Report on Distress for Rent[68] later in that year where we stated that we would be considering the collection rights of the Crown in a wider context in this Report. In the light of this we concluded that it would be appropriate to defer consideration of the Crown's rights of distress and deal with them in this Report, which is directed more specifically to its collection rights and remedies. The statutory provisions with which we are concerned are set out in full in Appendix E.

Distress is primarily a remedy designed to protect the interests of a landlord. In our Report on Distress for Rent we recommended legislation which would restate the law of distress in a new and modern form and would provide needed protection to the interests of tenants and third parties, while still providing a remedy which meets the legitimate expectations of commercial landlords. This legislation is not designed to give a general right of distress to any creditor, whether that creditor is the Crown or, for example, a general supplier. It is our view that there are other remedies available to such creditors which adequately protect their interests, in particular, the writ of seizure and sale issued pursuant to a judgment obtained by the creditor. We noted earlier that the Crown has certain procedural advantages in this regard, namely the right to obtain a "deemed judgment" upon filing a certificate in court.

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[68] LRC 53

We understand that the Crown rarely exercises its rights of distress, preferring, in the main, to obtain a "deemed judgment" and then proceed to execute upon that judgment. We believe this to be the more appropriate procedure, and would therefore recommend that the provisions of various taxation statutes that create a right of distress in respect of tax obligations be repealed.

The Commission recommends that:

10. (a) The following provisions be repealed:

- *(i) Section 43* Corporation Capital Tax Act;
- *(ii) Section 24* Insurance Premium Tax Act;
- *(iii) Section 33* Logging Tax Act;
- *(iv) Sections 12 (1) (b), (2), (3) and (4) of the* Mineral Land Tax Act;
- *(v) Section 34* Mineral Resource Tax Act;
- *(vi) Section 33* Mining Tax Act.

(b) The following provisions be amended by striking out the word "distress."

- *(i) Section 44* Corporation Capital Tax Act;
- *(ii) Section 25* Insurance Premium Tax Act;
- *(iii) Section 34* Logging Tax Act;
- *(iv) Section 35* Mineral Resource Tax Act;
- *(v) Section 34* Mining Tax Act.

3. Demand Notices

Another procedure that is often available to the Crown is the right to serve demand notice on debtors of a taxpayer which is comparable, in effect, to a garnishing order before judgment. While we believe the Crown should continue to enjoy this remedy, it should be obliged to notify a taxpayer that it has served a demand notice on one of his debtors. We should emphasize that this obligation should arise only after service of the demand notice itself, so that the taxpayer is not given advance warning of the Crown's intentions.

The Commission recommends that:

11. Where the Crown or any public body is entitled to demand of a person indebted to a debtor of the Crown or public body that the money otherwise payable by him be paid to the Crown or public body, then notice of such demand should be given to the person indebted to the Crown or public body within seven days of the demand being made.

CHAPTER X

CONCLUSION

A. General

As we stated in the Introduction, we approached this subject with a particular predisposition, namely that in private law matters where the interests of the government and those of a citizen collide, the citizen should be in no worse legal position than would be the case if he were competing with another citizen. It is this view that has led us to propose that in many instances the special position enjoyed by the Crown should be eliminated. On the other hand, we have concluded for the reasons set out in the previous chapter, that there are certain claims advanced by the Crown that do call for some preference, e.g., claims for wages under the *Employment Standards Act*, claims based on resource rents, and claims for assessments under the *Workers Compensation Act*. Where we believe some preference is justified, we have attempted to rationalize the scheme of priority so as to reduce the risk and mercantile inconvenience caused to third parties acting in ignorance of the existence of a particular lien. The various statutory provisions that are subject to our proposals are set out in full in Appendix A.

In Appendix B we set out other liens created by statute in favour of various levels of government which would be unaffected by the proposals in this Working Paper. The majority of these relate to liens created to secure the payment of taxes assessed against real property. The remainder relate to services that might be performed by various levels of government and the fees and levies that might be exacted in respect of these services. These fees for service are often modest and do not so far as we are aware cause any difficulties.

The focus of this Report has been upon the competition between the Crown and other creditors of a debtor. Because of the number of different Crown agencies that have the benefit of a lien, there might also be some competition between different Crown agencies. To some extent the priority of a particular Crown lien over another is specifically dealt with. Thus the liens created by the *Social Services Tax Act* and the *Workers Compensation Act* are subordinated to the lien for unpaid wages under the *Employment Standards Act*. In the majority of cases, however, no guidance is given as to how priority between different Crown liens is to be determined. This, apparently, has led to particular provincial bodies claiming a higher degree of priority over other provincial bodies.

Determining which claim has priority can be a difficult task. Furthermore, as one trustee in bankruptcy who has written to us has suggested, the propriety of such inter-agency competitions is questionable. As this correspondent pointed out:

> Even if these provincial bodies are to retain their priorities of a hypothetical 'secured' basis it is, . . . in the writer's view, unseemly for them to be perpetually arguing amongst themselves as to which is more 'secured'.
>
> A short example will illustrate the point. In a recent bankruptcy . . . there were sufficient funds only to make payments to creditors preferred under section 107 of the *Bankruptcy Act* which in this case embraced only Worker's Compensation Board of B.C. and Social Services Tax Department of B.C. We initially prepared a draft dividend list pursuant to section 107 under which the Worker's Compensation Board receives priority and thus would be paid in full the balance going to Social Services Tax Department. After receiving objections from the latter to this scheme of distribution we indicated, on several occasions spanning many months, that we would be prepared to distribute the money to the two bodies in any way that they mutually agreed (as the effect on any other creditor was zero).

> This was never done and so finally we paid the dividend pursuant to the *Bankruptcy Act* after giving the normal statutory notices that we intended to do so and indicating that in the event of a formal objection we should simply pay the funds into court. No such objection was received although we subsequently heard from the counsel acting for the Social Services Tax Department that they intended to pursue the matter in some other way.

We believe it is fair to say that if the proposals in this Report were implemented, the likelihood of such situations arising would be reduced significantly.

B. Summary of Recommendations

The Commission recommends:

1. The prerogative right of the Crown in right of British Columbia as a creditor to priority over other creditors of the same debtor be abolished. (Page 42)

2. The following lien provisions be repealed:

- *(a) section 38,* Corporation Capital Tax Act.
- *(b) section 19,* Insurance Premium Tax Act.
- *(c) section 28,* Logging Tax Act.
- *(d) section 11,* Mineral Land Tax Act.
- *(e) section 29,* Mineral Resource Tax Act.
- *(f) section 28,* Mining Tax Act. *(Page 49)*

3. Section 18 (1) (b) of the Social Services Tax Act *and section 16 (1) (b) of the* Hotel Room Tax Act *be repealed. (Page 54)*

4. The liens created in respect of amounts collected on behalf of the Crown and contained in the following statutory provisions, be repealed:

- *(a) section 16,* Hotel Room Tax Act;
- *(b) section 18,* Social Services Tax Act;
- *(c) section 15,* Tobacco Tax Act. *(Page 54)*

5. Sections 18 (4) and (5) of the Social Services Tax Act *and sections 16 (4) and (5) of the* Hotel Room Tax Act *be repealed. (Page 55)*

6. Section 19 of the Employment Standards Act *be amended by the addition of the words "except the provisions of section 15" after the words "this Act applies." (Page 59)*

7. Section 52 of the Workers Compensation Act *be amended to provide that*

- *(a) the lien does not have priority over a mortgage, or debenture, charging land, registered before registration in the land title office of a judgment in favour of the Board in respect of the amount owing by an employer;*
- *(b) the priority of the lien with respect to money advanced under a mortgage, or debenture, after the certificate of judgment was registered shall be determined as if it was a "subsequent" mortgage or judgment under section 24 (1) of the* Property Law Act. *(Page 63)*

8. Section 52 of the Workers Compensation Act *be amended to reflect the following principles:*

(a) *To secure an amount payable by an employer to the Board, the Board has a security interest in all personal property and its proceeds that is used in or in connection with or produced in or by the industry with respect to which the employer was assessed or the amount became payable,*
  (i) *if it is property in which the employer may create a security interest in favour of a person other than the Board, or*
  (ii) *where the employer is a corporation, if it is property in which a director, manager, or other principal of the corporation may create a security interest in favour of a person other than the Board.*

(b) *The priority and enforcement of a security interest arising under paragraph (a) shall be governed by the* Personal Property Security Act *as if the security interest were created consensually.*

(c) *For the purposes of the* Personal Property Security Act, *the security interest arising under paragraph (a)*
  (i) *attaches when a certificate is filed in a court under section 45 (2) of the* Workers Compensation Act, *and*
  (ii) *is perfected by*
    (A) *the Board taking possession of property, or*
    (B) *registration, in the Central Registry, of a financing statement indicating that a certificate in prescribed form has been filed under section 45 (2). (Page 64)*

9. Where the Crown or any public body is entitled to enforce a claim for the payment of money by means of a filing that confers upon the document filed the status of a judgment, the document should only be accepted for filing if it is endorsed with a statement that a copy of the document has been sent by registered mail to the debtor at the last address for the debtor according to the records of the Crown or public body. (Page 65)

10. (a) The following provisions be repealed:
  (i) *Section 43* Corporation Capital Tax Act;
  (ii) *Section 24* Insurance Premium Tax Act;
  (iii) *Section 33* Logging Tax Act;
  (iv) *Sections 12 (1) (b), (2), (3) and (4) of the* Mineral Land Tax Act;
  (v) *Section 34* Mineral Resource Tax Act;
  (vi) *Section 33* Mining Tax Act.

(b) *The following provisions be amended by striking out the word "distress."*
  (i) *Section 44* Corporation Capital Tax Act;
  (ii) *Section 25* Insurance Premium Tax Act;
  (iii) *Section 34* Logging Tax Act;
  (iv) *Section 35* Mineral Resource Tax Act;
  (v) *Section 34* Mining Tax Act. *(Page 66)*

11. Where the Crown or any public body is entitled to demand of a person indebted to a debtor of the Crown or public body that the money otherwise payable by him be paid to the Crown or public body, then notice of such demand should be given to the person indebted to the Crown or public body within seven days of the demand being made. (Page 66)

C. Acknowledgments

We wish to express our gratitude to all those who took the time to consider and respond to the Working Paper that preceded this Report. Their helpful comments and suggestions considerably sharpened our appreciation of the effect of our tentative proposals. Our particular thanks go to the Ministry of Finance for information which they provided on the mechanics of provincial taxation.

Finally, we wish to acknowledge the contribution of Anthony J. Spence, Counsel to the Commission. He carried the main burden of research and, subject to direction from the Commission, drafted the Working Paper and this Report. His knowledge and insight has been invaluable in assisting the Commission to confront a complex area of the law.

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October 7, 1982

APPENDICES

Appendix A

Statutory Liens in Favour of the Crown or Provincial Bodies Affected by Proposals in this Report

(Except as noted, the chapter number of each statute is that contained in the 1979 Revised Statutes of British Columbia.)

CHAPTER 69
CORPORATION CAPITAL TAX ACT

Tax to constitute a lien

38. (1) The tax imposed or assessed under this Act is a lien and charge in favour of the Crown on the entire assets of the corporation, or the entire assets of the corporation in the hands of a trustee, and has priority over all other claims of every person except claims secured by registered liens, charges or encumbrances.

(2) The liens and charges created by this section and their priority are not lost or impaired by any neglect, omission or error of the commissioner, or of any agent or officer, or by taking or failure to take proceedings to recover the tax, or by the tender or acceptance of any partial payment of the tax, or by want of registration.

S.B.C. 1980, CHAPTER 10
EMPLOYMENT STANDARDS ACT

Lien and charge on property

15. (1) Unpaid wages set out in a certificate constitute a lien, charge and secured debt in favour of the director against all the real and personal property of the obligor, including money due or accruing due to the obligor from any source.

(2) Notwithstanding any other Act, the amount of a lien and charge and secured debt referred to in subsection (1) is payable and enforceable in priority over all liens, judgments, charges or any other claims or rights including those of the Crown in right of the Province and, without limiting the generality of the foregoing, the amount has priority over

(a) an assignment, including an assignment of book debts, whether absolute or otherwise and whether crystallized or not,

(b) a mortgage of personal property,

(c) a debenture charging personal property, whether crystallized or not, and

(d) a contract, account receivable, insurance claim or proceeds of a sale of goods, whether made or created before or after the date the wages were earned or the date a payment for the benefit of an employee became due.

(3) Notwithstanding subsection (2), the lien charge and secured debt referred to in subsection (1) does not have priority over a mortgage of, or debenture charging, land, that was registered in a land title office before registration against that property of a certificate of judgment obtained pursuant to the filing under section 14, except with respect to money advanced under the mortgage or debenture after the certificate of judgment was registered.

Corporate officer liability

19. A person who was a director or officer of a corporation at the time wages of an employee of the corporation should have been paid is personally liable for the unpaid wages in an amount not exceeding 2 months' wages for each employee affected, and this Act applies to the recovery of the unpaid wages from that person.

CHAPTER 183
(As amended)
HOTEL ROOM TAX ACT

Liability for payment of tax collected

16. (1) Where a person who collects an amount of tax under this Act

(a) he shall be deemed to hold it in trust for Her Majesty in right of the Province for the payment over of that amount to Her Majesty in the manner and at the time required under this Act and the regulations, and

(b) the tax collected shall be deemed to be held separate from and form no part of the person's money, assets or estate, whether or not the amount of the tax has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who has collected the amount of the tax under this Act.

(2) The amount of tax that, under this Act,

(a) is collected and held in trust under subsection (1), or

(b) is required to be collected and remitted by an operator

constitutes a lien and charge on the entire assets of

(c) the estate of the trustee under paragraph (a),

(d) the person required to collect or remit the tax under paragraph (b), and

(e) the estate of the person required to collect or remit the tax under paragraph (b).

(3) The lien and charge constituted under subsection (2) has priority over all other claims.

(4) A person who, as assignee, liquidator, administrator, receiver, receiver manager, trustee or other similar person, other than a trustee appointed under the *Bankruptcy Act* (Canada), takes control or possession of the property of a person who has collected or is required to collect the tax under this Act shall, before distributing the property or the proceeds from the realization of it under his control, obtain from the director a certificate that the tax collected by that person in the year immediately preceding the date when that person lost control or possession of his property and not remitted by that person as required by this Act has been paid or that security acceptable to the minister has been given.

(5) An assignee, liquidator, administrator, receiver, receiver manager, trustee or other similar person, other than a trustee appointed under the *Bankruptcy Act* (Canada), who distributes the property referred to in subsection (4) or the proceeds of the realization of it without having obtained the certificate required by that subsection is personally liable to Her Majesty for an amount equal to the greater of

(a) the amount of tax that was collected by the person referred to in subsection (4) in the year immediately preceding the date when that person lost control or possession of his property and not remitted to the Crown, or

(b) the amount of tax that was required to be collected.

CHAPTER 205
INSURANCE PREMIUM TAX ACT

Tax constitutes lien

19. (1) A tax imposed or assessed under this Act forms a lien and charge in favour of the Crown on the entire assets of the estate of the taxpayer in the hands of any trustee, and has priority over all other claims of every person, except claims secured by registered liens, charges or encumbrances.

(2) The liens and charges created by this section and their priority shall not be lost or impaired by any neglect, omission or error of the commissioner, or an agent or officer, or by taking or failing to take proceedings to recover the taxes due, or by tender or acceptance of a partial payment of the taxes, or by want of registration. RS1960-198-20.

CHAPTER 248
(As amended)
LOGGING TAX ACT

Tax to constitute lien

28. (1) A tax imposed or assessed under this Act forms a lien and charge in favour of the Crown on the entire assets of the taxpayer or the taxpayer's estate in the hands of any trustee, and has priority over all other claims except claims secured by registered liens, charges or encumbrances.

(2) Subject to section 17, the liens and charges created by this section and their priority are not lost or impaired by any neglect, omission or error of the commissioner, or of any agent or officer, or by the taking or failure to take proceedings to recover the taxes due, or by the tender or acceptance of any partial payment of the taxes, or by want of registration.

CHAPTER 260
MINERAL LAND TAX ACT

Tax constitutes lien and charge

11. (1) Mineral land tax assessed and levied under this Act forms a lien and charge in favour of the Crown in right of the Province on all minerals and mineral land owned by the owner who is liable to pay the tax and has priority over all other claims, except claims secured by registered liens, charges or encumbrances on the minerals or mineral land.

(2) A lien and charge created by this section and its priority is not lost or impaired by neglect, omission or error of the administrator or by the taking or failure to take proceedings to recover mineral land tax that is not paid or by the tender or acceptance of any partial payment of mineral land tax.

CHAPTER 263
MINERAL RESOURCE TAX ACT

Tax to constitute lien

29. (1) A tax imposed or assessed under this Act forms a lien and charge in favour of the Crown on the entire assets of the operator and has priority over all other claims of every person, except claims secured by registered liens, charges or encumbrances on those assets.

(2) A lien and charge created by this section and its priority is not lost or impaired by

(a) neglect, omission or error of the commissioner or of any agent or officer;

(b) the taking or failure to take proceedings to recover the taxes due;

(c) the tender or acceptance of partial payment of the taxes; or

(d) failure to register the lien or charge. 1976-31-29.

CHAPTER 267
(As amended by Bill 13, 1981)
MINING TAX ACT

Tax to constitute lien

28. (1) A tax imposed or assessed under this Act forms a lien and charge in favour of the Crown on the entire assets of the taxpayer or the taxpayer's estate in the hands of a trustee and has priority over all other claims of every person, except claims secured by registered liens, charges or encumbrances.

(2) The liens and charges created by this section and their priority shall not be lost or impaired by neglect, omission or error of the commissioner or of any agent or officer or by the taking or failure to take proceedings to recover the taxes due or by the tender or acceptance of partial payment of the taxes or by want of registration.

CHAPTER 388
(As amended)
SOCIAL SERVICE TAX ACT

Liability for payment of tax collected

18. (1) Where a person collects an amount of tax under this Act

(a) he shall be deemed to hold it in trust for Her Majesty in right of the Province for the payment over of that amount to Her Majesty in the manner and at the time required under this Act and regulations, and

(b) the tax collected shall be deemed to be held separate from and form no part of the person's money, assets or estate, whether or not the amount of the tax has in fact been kept separate and apart from either the person's own money or the assets of the estate of the person who collected the amount of the tax under this Act.

(1.1) Where a vendor or lessor sells or leases tangible personal property, any money received by him in respect of the sale or lease, up to the full amount of the tax owing, shall be deemed to be payment of the tax owing by the purchaser or lessee under this Act, and

(2) The amount of taxes that, under this Act,

(a) is collected and held in trust in accordance with subsection (1); or

(b) is required to be collected and remitted by a vendor or lessor

forms a lien and charge on the entire assets of

(c) the estate of the trustee under paragraph (a);

(d) the person required to collect or remit the tax under paragraph (b); or

(e) the estate of the person required to collect or remit the tax under paragraph (d).

(3) The lien and charge created under subsection (2) has priority over all other claims other than a lien under section 15 of the *Employment Standards Act*.

(4) A person who, as assignee, liquidator, administrator, receiver, receiver manager, trustee or other like person, other than a trustee appointed under the *Bankruptcy Act* (Canada), takes control or possession of the property of a person who has collected or is required to collect the tax under this Act shall, before distributing the property or the proceeds from the realization of it under his control, obtain from the commissioner a certificate that the tax collected by that person in the year immediately preceding the date when that person lost control or possession of his property and not remitted by that person as required by this Act has been paid or that security acceptable to the minister has been given.

(5) An assignee, liquidator, administrator, receiver, receiver manager, trustee or other similar person, other than a trustee appointed under the *Bankruptcy Act* (Canada), who distributes property referred to in subsection (4) or the proceeds of the realization of it without

having obtained the certificate required by that subsection is personally liable to the Crown for an amount equal to

(a) the amount of tax that was collected by the person referred to in subsection (4) in the year immediately pre ceding the date when that person lost control or possession of his property and not remitted to the Crown; or

(b) the amount of tax that was required to be collected, whichever is the greater.

CHAPTER 404
TOBACCO TAX ACT

Liability for payment of tax collected

15. Every person who collects any tax under this Act shall be deemed to hold it in trust for Her Majesty in right of the Province and for the payment over of it in the manner and at the time provided under this Act or the regulations; and the amount, until paid, forms a lien and charge on the entire assets of that person, or his estate in the hands of any trustee, having priority over all other claims of any person.

CHAPTER 437
WORKERS COMPENSATION ACT

Priority as to amounts due board

52. (1) Notwithstanding anything contained in any other Act, the amount due by an employer to the board, or where an assignment has been made under subsection (4), its assignee, on an assessment made under this Act, or in respect of an amount which the employer is required to pay to the board under this Act, or on a judgment for it, constitutes a lien in favour of the board or its assignee payable in priority over all liens, charges or mortgages of every person, whenever created or to be created, with respect to the property or proceeds of property, real, personal or mixed, used in or in connection with or produced in or by the industry with respect to which the employer was assessed or the amount became payable, excepting liens for wages due to workers by their employer, and the lien for the amount due the board or its assignee continues to be valid and in force with respect to each assessment until the expiration of 5 years from the end of the calendar year for which the assessment was levied.

(2) Where the employer is a corporation, the word "property" in subsection (1) includes the property of any director, manager or other principal of the corporation where the property is used in, or in connection with, the industry with respect to which the employer was assessed or the amount became payable, or was so used within the period in respect of which assessments are unpaid.

(3) Without limiting subsection (1), the board may enforce its lien by proceedings under the *Court Order Enforcement Act*.

(4) The board may assign its lien rights to a person, contractor or subcontractor who has fully discharged his liability for the amount of an assessment under section 51 by payment of it.

(1.1) The exception in subsection (1) does not apply in respect of a lien for wages, that is, by section 15 (3) of the *Employment Standards Act*, postponed to a mortgage or debenture.

Appendix B

Statutory Liens of the Crown or Provincial Bodies not Affected by Proposals Contained in this Report

CHAPTER 51
COAL ACT

Lien

29. (1) Royalty money payable to the Crown under this Act
- (a) is due and payable according to the regulations;
- (b) bears interest as prescribed by the regulations;
- (c) may be recovered in a court as a debt due to the Crown; and
- (d) constitutes a lien in favour of the Crown
  - (i) on coal produced from a location but not disposed of under section 28 (3); and
  - (ii) on chattels or an interest in them owned by the person who owes the money, whether or not the chattels are used in producing, transporting or processing the coal for which the money is due and payable, and the lien has priority over all other claims except claims secured by liens, charges or encumbrances registered against the coal or chattels before the money is due and payable.

(2) A lien constituted under subsection (1) is not lost or impaired by reason only that
- (a) proceedings are or are not taken to recover the money;
- (b) partial payment of the money is tendered or accepted; or
- (c) the lien is not registered.

(3) Where default is made in the payment of all or part of money due and payable, the assessor may issue a certificate stating
- (a) the amount unpaid, including interest; and
- (b) the name of the person required to pay it

and may file the certificate with the court registry having jurisdiction.

(4) A certificate filed under subsection (3) has the same effect as an order of the court for the recovery of a debt in the amount stated in the certificate against the person named in it, and all proceedings may be taken as if it were an order of the court.

CHAPTER 52
COAL MINE REGULATION ACT

Powers of inspector to do work and charge cost

14. (1) Where the inspector finds that work is required in order to avoid danger to persons or property, the inspector shall have the right of entry on or below the surface of any land and may cause the work to be done. The costs incurred shall be paid from the consolidated revenue fund, and the amount of costs paid shall be a lien and charge on the mine or mining work in favour of the Crown, of which notice in the form prescribed by the minister may be registered as a charge in the land title office for the land title district in which the mine is situate, or in the office of the Ministry of Energy, Mines and Petroleum Resources at Victoria, and no transfer of, or other dealing with, the mine or mining work shall take place until the amount is paid.

(2) The amount of the costs incurred, with interest, is due from the owner to the Crown and recoverable in any court at the suit of the Attorney General.

(3) Notwithstanding subsections (1) and (2), the minister, with or without payment, and on the conditions thought proper, may cause a cancellation of the charge to be registered in the land title office or in the office of the Ministry of Energy, Mines and Petroleum Resources at Victoria, and thereupon the lien and charge are cancelled.

CHAPTER 112
ESQUIMALT AND NANAIMO RAILWAY BELT TAX ACT

Taxes constituted a lien and charge

6. Tax assessed or imposed by virtue of this Act shall form a lien and charge in favour of the Crown on the land on which it is assessed or imposed, and every such lien or charge has priority over every other lien, charge or encumbrance of every person on that land. RS1960-133-7.

CHAPTER 133
FIRE SERVICES ACT

Order where owner absent

23. (1) Where there is no occupier of premises about which an order is made, and the owner is absent from the Province or his whereabouts is unknown, the fire commissioner may carry out an order involving an expenditure of not more than $100 and, with the approval of the Attorney General, any other order.

(2) Where the land on which the premises are situate is in a municipality, the fire commissioner shall certify to its treasurer the costs actually and necessarily incurred in carrying out the order. The treasurer shall pay the amount to the fire commissioner from the ordinary revenue of the municipality. The amount forms a special lien, within section 438 of the *Municipal Act*, on the land and the improvements in favour of the municipality, and shall for all purposes be delinquent taxes on the land under the *Municipal Act* from the date of the payment. The *Municipal Act* applies to collection and recovery.

(3) Where the land on which the premises are situated is a rural area, the fire commissioner shall certify the cost to the surveyor of taxes, and the costs shall then form a lien and charge on the land in favour of the Crown and shall for all purposes be delinquent taxes from the date of the certificate. The *Taxation (Rural Area) Act* applies to collection and recovery. Money recovered shall be accounted for as part of the consolidated revenue fund.

CHAPTER 140
FOREST ACT

Division (2)—Recovery of Money

Lien

141. (1) Money that is required to be paid to the Crown under this or the former Act or under an agreement made under this Act or the former Act

(a) is due and payable by the date specified for payment in a statement to, or notice served on, the person who is required to pay it;
(b) bears interest as prescribed;
(c) may be recovered in a court as a debt due to the Crown; and
(d) constitutes, in favour of the Crown,
  (i) a lien on timber, lumber, veneer, plywood, pulp, newsprint, special forest products and wood residue owned by the person who owes the money; and
  (ii) a lien on chattels or an interest in them, other than chattels referred to in subparagraph (i), owned by the person who owes the money.

(2) A lien under subsection (1) (d) (i) has priority over all other claims, and a lien under subsection (1) (d) (ii) has priority over all other claims other than claims secured by liens, charges and encumbrances registered against the chattels before the money is due and payable.

(3) A lien constituted under subsection (1) is not lost or impaired by reason only that

(a) proceedings to recover the money are taken or not;
(b) partial payment of the money is tendered or accepted; or
(c) the lien is not registered.

(4) Where default is made in the payment of all or part of the money due and payable the minister may issue a certificate stating

(a) the amount that remains unpaid, including interest; and
(b) the name of the person who is required to pay it and may file the certificate with a court having jurisdiction.

(5) A certificate filed under subsection (4) has the same effect as an order of the court for the recovery of a debt in the amount stated in the certificate against the person named in it, and all proceedings may be taken as if it were an order of the court.

CHAPTER 177
HOSPITAL (AUXILIARY) ACT

4. (1) Every applicant for admission to a Provincial auxiliary hospital who is possessed of any property shall on application for admission, and every patient of a Provincial auxiliary hospital who acquires any property shall on acquiring the property, notify the superintendent of the possession or acquisition, and whenever requested by the superintendent shall by instrument pay, assign, transfer and set over the property, or as much of it as the superintendent may designate, to the Crown in right of the Province.

(2) Where a patient fails to comply with subsection (1) and the minister determines that it is necessary that some or all of the property of the patient or the proceeds from the sale of it be used to defray all or part of the cost of care and treatment of the patient, the minister may, by certificate, set forth the circumstances and a description of the property of the patient to be used or the proceeds of the sale of which are to be used for that purpose, and thereupon the property described is deemed to be paid, assigned, transferred and set over to the Crown in right of the Province.

(3) Subject to section 3 (2), all property paid, assigned, transferred and set over to the Crown in right of the Province under subsections (1) and (2) shall be held in trust at the credit of the patient, and there shall be deducted from that, to accrue as Provincial revenue, the

(a) expenses of his care and treatment in the Provincial auxiliary hospital;
(b) sums designated by the minister as a "comfort allowance" that have been paid to or expended on behalf of the patient; and
(c) expenses of his burial;

but the property held in trust may, with the approval of the minister, be sold at any time and the proceeds of the sale held in trust for the purposes set forth herein.

(4) The Crown in right of the Province has a lien on the property of every patient in the total amount of the daily charges for the care and treatment of the patient that have not been recovered from property or proceeds of the sale of the property of the patient, and the minister may, where he is satisfied that neither the spouse nor surviving spouse nor any near relative of the patient will thereby be caused unreasonable hardship, by certificate, set forth the amount for which the lien is effective and a description of the property of the patient or his estate to be used or the proceeds of which are to be used to defray that amount or some part of it, and on that the property described becomes vested in the Crown in right of the Province.

(5) The daily sum to be charged for the care and treatment of a patient shall be determined by the Lieutenant Governor in Council.

(6) The balance of the property remaining after the authorized deductions have been made shall be returned to the patient on his discharge or shall be transferred to his personal representatives on his death.

CHAPTER 218
LAND TAX DEFERMENT ACT

Duties of registrar

7. On receipt from the minister of an agreement made under section 6, the registrar of the land title office shall register it as an encumbrance, as defined in the *Land Title Act*, in favour of the Crown and having preference or priority over every claim, lien, charge or encumbrance subsequently registered or filed, and shall note on every certificate of title for the land described in the agreement an endorsement that the certificate of title is subject to an agreement under this Act.

CHAPTER 222
LAND (VETERANS) ACT

Lien in favour of Canada where land improved

5. If Canada in preparation for the settlement of veterans under the Act of Canada makes improvements on Crown land reserved under section 3, Canada has a lien on the land improved for the value of the improvements.

CHAPTER 265
MINING REGULATION ACT

Duty to fence shafts and openings

11. (1) When a mine has been closed down or work in it has been discontinued, the owner or agent shall cause the entrances to the mine and all other pits and openings, dangerous by reason of their depth or other conditions, to be fenced and to be kept securely fenced or otherwise protected against inadvertent access, to the satisfaction of the inspector and within a time specified by the inspector, unless the inspector grants exemption in writing, which he may do if in his opinion the workings present no greater hazard than the natural topographic features of the district.

(2) Where the inspector finds that work is required in order to avoid danger to persons or property, the inspector may cause the work to be done, and the costs incurred shall be paid from the consolidated revenue fund. The amount of costs paid shall be a lien and charge on the mine or mining work in favour of the Crown, of which notice in the form the minister may prescribe

may be registered in the land title office for the land title district in which the mine is situated and in the office of the gold commissioner in the mining district in which the mine is situated and no further transfer or other dealings with the mine or mining work shall take place until the amount is paid.

(3) The amount of the costs incurred, with interest, is due from the owner to the Crown and recoverable in a court at the suit of the Attorney General.

(4) Notwithstanding subsections (2) and (3), the minister, with or without payment and on the terms and conditions he considers proper, may cause a cancellation of the charge to be registered in the land title office and the gold commissioner's office in which the charge is registered, and the lien and charge is then cancelled.

CHAPTER 281
MOBILE HOME ACT
[Part to be proclaimed]

Payment of taxes by others

52. (1) A person not primarily liable for taxes in respect of a mobile home, who

(a) is the holder of a security interest in the mobile home; and

(b) pays the taxes in order to obtain a transport permit under section 41, is entitled to add the amount paid to the principal money secured by the security interest, or to deduct the amount from rent, purchase price or other money payable under the instrument in respect of which he claims registration and the amount shall bear interest at the prescribed annual rate from the date of payment.

(2) Subject to subsection (4), where the person paying the taxes under subsection (1) is not the holder of the first registered security interest in the mobile home, he is entitled, in respect of the amount paid, to file in the register a lien in the prescribed form against the mobile home and the lien has the same priority as if it were a certificate filed under section 53.

(3) An amount and interest paid under subsection (1) is a debt recoverable by action in a Supreme, County or Provincial Court by the person paying the taxes against the person primarily liable.

(4) A person who pays taxes under this section shall, within 60 days after the date of payment, give notice in writing of the payment to each holder of a security interest in the mobile home that is registered, or registration of which has been applied for, and in default of so doing he is not entitled to the priority provided in subsection (2) as against prior secured parties.

(5) A notice under subsection (4) is sufficiently given if mailed under registered cover and addressed to each secured party, at his respective address, as appears in the security instrument or in the application for registration.

(6) A holder of a prior security interest may, at any time, pay the amount of the taxes on the mobile home with interest to the date of payment, to the person who has paid them, and is subrogated to all the rights and priorities provided by this section.

Tax lien by Crown or municipality

53. (1) Where taxes in respect of a mobile home imposed under the *Municipal Act*, *Taxation (Rural Area) Act*, *Vancouver Charter*, *Water Act* or *Drainage, Ditch and Dyke Act*, Part 2, have become due, the collector may, at any time during which the taxes remain unpaid, file a certificate in the prescribed form in the mobile home registry office, stating

(a) the registration number of the mobile home;

(b) that taxes in respect of the mobile home have become due; and

(c) the name and address of the taxing authority to which the taxes are payable.

(2) On receipt of a certificate under this section the registrar shall, without fee, file the certificate and make reference to it in the register in respect of the mobile home to which the certificate relates.

(3) Where a collector has filed a certificate under this section he shall, without fee, provide to any person requesting it a written statement showing the amount of all unpaid taxes, interest and penalties, if any, charged against the mobile home to which the certificate relates.

(4) Where a person pays the unpaid taxes, interest and penalties, if any, charged against the mobile home in respect of which the certificate has been filed, the collector who filed the certificate shall file a cancellation of it.

(5) A certificate filed under this section creates a lien on the mobile home in respect of which the certificate has been filed for the amount certified in the certificate, and the lien has preference over every other security interest or claim, whether secured or unsecured, except the Crown, and no further registration or formality is necessary to preserve it.

(6) A collector may, at any time, apply to the court, on notice the court directs, for any order he considers necessary or advisable to protect or enforce the lien created under subsection (5).

(7) On application under subsection (6), the court may make such interim order as it considers appropriate and, without limiting the generality of the foregoing, the court may order that the mobile home be seized and delivered into the possession of the collector who filed the certificate.

(8) Taxes levied in respect of a mobile home are recoverable in any manner in which taxes are recoverable under the *Municipal Act*, *Taxation (Rural Area) Act*, *Vancouver Charter* or any other Act, and notwithstanding that possession of a mobile home has been delivered to a collector under subsection (7), it shall not be sold or otherwise disposed of in a manner other than in compliance with the Act under which the taxes were levied.

(9) A collector is not liable in any proceeding for or in respect of an act or thing done or omitted to be done by him as a result of which the mobile home seized under subsection (7) has deteriorated, become dilapidated or sustained damage while it was in his possession.

[(10) Subject to the *Mobile Home Tax Act*, a mobile home, whether or not it falls within the definition of an improvement under the *Assessment Act*, *Municipal Act*, *School Act*, *Taxation (Rural Area) Act*, *Vancouver Charter* or any other Act, shall be deemed to be an improvement for the purpose of real property assessment and taxation under the relevant Act, and except as provided in section 3 of the *Mobile Home Tax Act*, shall be assessed and taxed in the name of the owner of the land on which the mobile home is situated at the time of assessment under those Acts.]

(11) Notwithstanding subsections (5) to (9), where default is made in the payment of taxes due and payable under the *Municipal Act*, *Taxation (Rural Area) Act*, *Vancouver Charter* or any other Act, a collector may file the certificate issued under subsection (1) with any district registrar of the Supreme Court, or with the registrar of any County Court, and, where so filed, the certificate shall be of the same force and effect and all proceedings may be taken on it as if it were a judgment of the court for the recovery of a debt of the amount stated in the certificate against the person named in it.

CHAPTER 282
MOBILE HOME TAX ACT

Tax collection

5. The taxes assessed in respect of a mobile home under section 3 are recoverable in any manner in which taxes are recoverable under the *Municipal Act*, *School Act*, *Taxation (Rural Area) Act* or the *Vancouver Charter*; but

(a) the land comprising the mobile home park is not subject to tax sale or forfeiture; and

(b) the arrears of taxes or delinquent taxes do not constitute a lien on the land by reason of taxes assessed under section 3.

CHAPTER 290
MUNICIPAL ACT

Operational details

405. (1) The assessor shall continue to assess land subject to an agreement as if the agreement had not been made and shall maintain a record of the values assessed. The owner of the land has the usual right of complaint and appeal for that annual assessment.

(2) An agreement under section 402 is registrable in the proper land title district, and on registration constitutes a charge on the land, having preference over a claim, lien, privilege or encumbrance of any person except the Crown.

(3) All amounts for which an owner of land becomes liable to a municipality under sections 402 to 404 form a charge on the land and are collectable in the same manner and with the same remedies as ordinary taxes on land and improvements under this Act.

(4) The registrar of a land title office shall not transfer land subject to an agreement under this section without the approval of the inspector or a certificate from the clerk of the municipality showing that all obligations for amounts owing by the owner under sections 402 to 404 and the agreement having been discharged.

Special rates to be charges

435. (1) A charge imposed under section 612, 614, 640 or 641 (1) (a), (b) or (c), or for work or services provided, whether on default or otherwise, under an enactment now or formerly in force, is a charge or lien on the land or real property on or for which the charge is imposed, done or provided, with priority over any claim, lien, privilege or encumbrance of any person except the Crown. The charge does not require registration to preserve it, and the amount of the charge shall be collected in the same manner and with the like remedies as ordinary taxes on land and improvements under this Act.

(2) A charge specified in subsection (1) that is due and payable by December 31 and unpaid on that date shall be deemed to be taxes in arrear and shall promptly be so entered on the tax roll by the collector.

Taxes a special charge

438. (1) Taxes accrued and to accrue on land and its improvements, and a judgment under section 448 for the taxes, are a special charge on the land and improvements, with priority over any claim, lien, privilege or encumbrance of any person except the Crown. The charge does not require registration to preserve it.

(2) Where it is necessary or advisable to protect or enforce a charge by a proceeding, it may be done by order of the court, on application for it and on notice the court considers proper.

Assessment during redemption period

467. (1) During the period allowed for redemption, the real property shall continue to be assessed and taxed in the name of the person who at the time of sale appeared on the assessment roll as owner and he is liable for taxes accruing. The taxes accruing shall continue to be a special lien on the property under section 438.

(2) The purchaser at the tax sale may pay the taxes which become due during the period of redemption, and the amount so paid shall be added to the amount required to redeem.

Reinstatement of taxes where sale set aside

474. (1) The court, in giving judgment that the sale be set aside or declared invalid for a reason given in section 473 (1) (c) (iii) or (iv), may provide that the amount for which the real property was taxed on the property tax roll at the date of sale, with interest from that date is and continues to be a lien on the property as if the tax sale had not taken place, and shall after that be deemed to be delinquent taxes, or may provide for the immediate payment of those taxes or may otherwise deal with them according to the circumstances.

(2) If during the period allowed for redemption the council finds a manifest error in the sale or in the proceedings prior to it, it may by resolution order that the purchase price be returned to the purchaser with interest at the rate of 6% a year, and that the taxes as they appeared on the property tax roll prior to the sale be restored to the roll, and thereafter they shall be deemed delinquent taxes, or the council may otherwise deal with those taxes as the circumstances require.

Charges and rates for utilities

636. (1) Where utility works, services or facilities other than transportation are operated and maintained for inhabitants of localities adjacent to the municipality, the rates, charges and fees shall be a separate charge on the land or land and improvements to or on which services or facilities are supplied or used, having preference over any claim, lien, privilege or encumbrance of every person except the Crown, and shall not require registration to preserve it.

(2) Those rates, charges and fees which remain unpaid after December 31 in any year shall be deemed to be taxes in arrear on the property concerned if unpaid after March 31 in the year next following, with interest at 8% a year accrued on them as from the first day of January of the latter year, and the collector shall promptly, after March 31, forward to the Surveyor of Taxes or municipal collector in whose jurisdiction the real property lies a statement showing the amount of the arrears. The surveyor or collector shall add the amount to the taxes payable on the property, and after that the amount subsequently added according to this subsection shall be deemed to be Provincial or municipal taxes, as the case may be, and shall be dealt with in the same manner as taxes against the property would be under the *Taxation (Rural Area) Act* or this Act.

(3) Where an amount has been added, the Minister of Finance or the municipal treasurer, as the case may be, shall pay that amount as and when collected to the municipality concerned.

(4) Where an amount has been added and has not been sooner paid, then the Minister of Finance or the municipal treasurer, as the case may be, shall, in the event of the upset price being obtained at the time of selling the real property at a tax sale, pay the municipality concerned out of the proceeds of the sale the total amount due for utility charges in arrear; but if the upset price is not obtained and subsequently the property is sold, the proceeds of sale shall be applied according to the respective interests in the upset price.

(5) Notwithstanding subsections (1) to (4), the municipality may bring action in a court of competent jurisdiction to recover an amount due and owing by a person to the municipality arising out of the supplying of a work, service or facility referred to in subsection (1).

(6) This section does not apply to a municipality unless the approval required by section 634 (4) has been obtained or the municipalities concerned agree to the application of this section.

Lien for taxes and tolls

836. (1) Notwithstanding anything contained in any statute, every assessment made, every tax imposed or levied, accrued or to accrue on any land, and every toll or charge fixed under a bylaw of an improvement district forms a lien and charge on the land on which it has been imposed, levied, accrued or fixed, having preference over any claim, lien, privileges or encumbrance of any person, except the Crown and municipal taxes previously accrued, and does not require registration to preserve it.

(2) If it is necessary or advisable to protect or enforce the lien by action or proceeding, it may be done by order of any court of competent jurisdiction, on application for it and on the notice that the court directs.

(3) The lien constitutes a lien and charge on the whole parcel of land affected, notwithstanding that the tax, toll or charge forming the lien may have been imposed, levied, fixed or calculated on a part only, or on improvements of any kind or class.

(4) Where a parcel of land on which there are taxes owing to an improvement district is subdivided the collector may apportion the taxes among the several parts of the parcel and their owners as nearly as possible in conformity with the classification of the land comprising the parts at the time the taxes were levied.

Interest on taxes

837. The taxes payable to an improvement district bear interest at the rate of 12% a year from March 1 next following the date on which they are levied, until paid or recovered. The interest is from day to day deemed part of the taxes, and a reference to taxes is deemed to include all interest so added. The interest is to the same extent as the taxes a lien and charge.

CHAPTER 313
PATIENTS PROPERTY ACT

Advances

25. (1) On the recommendation of the Attorney General, the Lieutenant Governor in Council may authorize the Minister of Finance to advance to the Public Trustee temporary loans in prescribed amounts for prescribed periods and on prescribed terms and conditions for the advantageous administration of an estate in the hands of the Public Trustee.

(2) Where a loan is made under subsection (1), it is a first lien or charge on all the property and assets of the estate of the patient in favour of Her Majesty in right of the Province and has priority over all other charges or encumbrances on that estate.

(3) All money belonging to the estate of a patient which is to the credit of the account of the Public Trustee shall draw interest, payable by the Minister of Finance, at the rate, if any, the Lieutenant Governor in Council, on the recommendation of the Minister of Finance, may direct. Until otherwise ordered by the Lieutenant Governor in Council, the money shall draw interest at the rate of 3% per annum from the first day of the next month after payment of the money into the account until the first day of the month during which the money is paid out, and no interest shall be paid for fractions of a month. [Note: pursuant to B.C. Reg. 328/77 the interest payable under s. 25 (3) has been altered to 1% below the prime lending rate of the banker to the Province, effective July 1, 1977.]

CHAPTER 354
RAILWAY ACT

Penalties a first charge on railway

291. If a penalty is imposed on a company under this Act, the penalty is the first lien or charge on the railway, property, assets, rents and revenues of the company.

CHAPTER 359
RECREATIONAL LAND ACT

Default under covenant

7. (1) Where the minister believes a covenant contained in an agreement entered in respect of recreational land under sections 3 and 4 is not being or has not been complied with, he may, subject to the approval of the Lieutenant Governor in Council,

(a) demand repayment of all or part of the money paid to the owner under section 6 and interest from the date of the payment to the owner to the date of repayment to the minister, at the rate of 8% per year;

(b) file a lien, in a form prescribed by the minister, against the land for the amount owing; and

(c) file a statement, in a form prescribed by the minister, with a registrar of the Supreme Court.

(2) The filing of a statement under subsection (1) (c) constitutes, for all purposes, a judgment in favour of the Crown against the owner for the amount set out in the statement.

(3) No action taken by the minister under subsection (1) shall, unless he otherwise orders, have the effect of releasing, discharging or otherwise affecting any covenant contained in an agreement entered into in respect of recreational land under section 3.

CHAPTER 400
TAXATION (RURAL AREA) ACT

Lien for taxes

29. (1) Taxes assessed or imposed and due for land and improvements under this Act, or any property subject to taxation under another Act, form a lien and charge in favour of the Crown on the entire property taxed; and every lien or charge created by this subsection has priority over every other lien, charge or encumbrance on the property.

(2) The lien or charge created by this section and its priority is not lost or impaired by any neglect, omission or error of the collector or of an agent or officer, or by taking or failing to take proceedings to recover the taxes due, or by tender or acceptance of partial payment of the taxes or by want of registration.

Effect of sale of property subject to lien

30. (1) No sale or transfer of possession of any property subject to a lien or charge in favour of the Crown shall affect the right of distress or sale of the property under this Act for the recovery of the taxes.

(2) A person who acquires property on which a lien under this Act exists is jointly liable with the owner originally assessed for payment of the taxes.

Unpaid taxes constitute first charge

31. Where property is sold the amount of the tax lien for unpaid taxes constitutes a first charge on the proceeds of sale.

CHAPTER 420
UNIVERSITY ENDOWMENT LAND ACT

Taxation for year in which land sold or leased

8. Where any parcel of land in any part of said District Lot 140 is disposed of by sale or lease under the Act, the land comprised in the parcel and the improvements on it shall for all purposes of taxation referred to in sections 5 and 6 be assessed and taxed in respect of the year in which the disposition of the parcel takes place, but a part only of that year's taxes pro rata to the part of the year unexpired at the time of the disposition shall be imposed and form a lien or charge on the property assessed and shall be collected in respect of that year.

CHAPTER 55
VANCOUVER CHARTER

395A. (1) For the purposes of this section, "land" means land maintained as a golf course.

(2) Notwithstanding the provisions of this or any other Act, the Council may enter into an agreement with the owner of land fixing an amount that shall be deemed to be the assessed value of the land during the term of the agreement for the purpose of levying taxes for general purposes only.

(3) The actual value of the land as determined by the Assessor pursuant to the provisions of the *Assessment Act* shall be set out in the agreement.

(4) If the owner of land which is covered by such an agreement sells the land, he shall be liable to the city either for one-half of the amount by which the sale price exceeds the actual value as set out in the agreement pursuant to subsection (3) or for the sum calculated under subsection (6), whichever is the greater amount.

(5) If the owner of land which is covered by such an agreement sells part only of the land, he is liable to the city for an amount equal to

- (a) the difference between the taxes that have been paid since the date of the agreement and the taxes that would have been paid but for the agreement, together with accrued interest on the difference compounded annually at six per centum; and

(b) one-half the difference between
  (i) the sale price of the land being sold where the sale price exceeds the amount determined under paragraph (ii); and
  (ii) the amount that bears the same proportion to the actual value of the land covered by the agreement that the area of the land sold bears to all the land covered by the agreement.

(6) If the owner of land covered by such an agreement allows the land or any part thereof to be used for any purpose other than a golf course, he is liable for and shall pay to the city an amount equal to the difference between the taxes that have been paid since the date of the agreement and the taxes on the whole of the land that would have been compounded annually at six per centum, and the agreement shall be terminated with respect to the land the use of which has changed.

(7) The city shall have the first right of refusal in respect of any land that is the subject of an agreement under this section.

(8) The assessor shall continue to assess land covered by such an agreement and shall maintain a record of such assessments. The owner of the land shall have the right to appeal such assessments.

(9) An agreement under this section is registrable under the *Land Titles Act*, and upon registration constitutes a charge upon the land having preference over any claim, lien, privilege, or encumbrance of any party except the Crown.

(10) Notwithstanding the provisions of this section,
  (i) the Council may enter into an agreement with Shaughnessy Golf and Country Club fixing the amount that shall be deemed to be the assessed value of the latter's interest in the land presently maintained as Shaughnessy Golf and Country Club;
  (ii) the actual value of the interest of Shaughnessy Golf and Country Club in the land as determined by the Assessor pursuant to the provisions of the *Assessment Act* shall be set out in the agreement together with the value of the interest;
  (iii) if after entering into such an agreement Shaughnessy Golf and Country Club sublets or assigns the whole or any part of the land covered by the agreement to any person other than the City of Vancouver, or uses or permits the land or any part thereof to be used for any purpose other than a golf course, then the agreement shall become null and void and Shaughnessy Golf and Country Club shall be liable and shall pay to the city an amount equal to the difference between the taxes that have been paid since the date of the agreement and the taxes that would have been paid but for the agreement, together with accrued interest on the difference compounded annually at six per centum;
  (iv) the city shall have the first right of refusal on Shaughnessy Golf and Country Club's interest in the lands;
  (v) the city shall have a charge against the interest of Shaughnessy Golf and Country Club for the payment of all moneys and the performance of all obligations required to be paid or observed or performed by Shaughnessy Golf and Country Club under the agreement, and such charge shall have preference over any claim, lien, privilege, or encumbrance of any person except the Crown.

(11) Save and except an agreement under subsection (10) hereof, no agreement under this section shall be binding on either party or have any force or effect until registered in the land titles office.

414. Real-property taxes payable under this Act, together with interest thereon, shall constitute a special lien upon the real property in respect of which they are payable, having preference to any claim, lien, privilege, or encumbrance of any person except the Crown, and shall not require registration to preserve it.

436. Notwithstanding that any parcel may have been sold for real-property taxes, it shall, during the time allowed for redemption, remain on the assessment roll and on the tax roll in the name of the owner, or owner under agreement, as it appears thereon at the time of the sale; real-property taxes shall continue to be payable by such owner, or owner under agreement, and shall continue to constitute a special lien on the parcel as provided by section 414.

444. If in any such action the sale is set aside and declared invalid on the ground that the sale was not fairly and openly conducted, the Court may order that the taxes accrued in respect of the parcel, together with interest, shall be, and continue to be, a special lien upon the parcel as if the sale had not taken place, and that such taxes and interest shall be deemed to be delinquent taxes, or the Court may order the immediate payment of such taxes and interest, or may make such other order as shall be just.

Appendix C

Extract from the Government Code of California:

Article 1

DEFINITIONS

Sec.
7150. Construction of chapter.
7150.5. Agency.
7151. Bona fide purchaser.
7152. Buyer in ordinary course of business.
7153. Chattel paper.
7154. Deposit account.
7155. Duly negotiated.
7156. Holder in due course.
7157. Instrument.
7158. Personal property.
7159. Purchase money security interest.
7160. Real property.
7161. Security.
7162. State tax lien.
7163. Tax.
7164. Taxpayer.

Article 1 was added by Stats.1980, c. 600, § 4.

Article 1 is operative Jan. 1, 1981.

§ 7150. Construction of chapter

Unless the context otherwise requires, the words and phrases defined in this article govern the construction of this chapter.

(Added by Stats.1980, c. 600, p. ——, § 4.)

§ 7150.5. Agency

"Agency" means:

(a) The Department of Fish and Game with respect to a state tax lien created under Section 8048 of the Fish and Game Code.

(b) The Director of Employment Development with respect to a state tax lien created under Section 1703 of the Unemployment Insurance Code.

(c) The Franchise Tax Board with respect to a state tax lien created under Section 18881 or 26161 of the Revenue and Taxation Code.

(d) The State Board of Equalization with respect to a state tax lien created under Section 6757, 8996, 30322, 32363, or 38532 of the Revenue and Taxation Code.

(e) The Controller with respect to a state tax lien created under Section 3423 or 3772 of the Public Resources Code or Section 7872 or 16063 of the Revenue and Taxation Code.

(Added by Stats.1980, c. 600, p. —, § 4.)

§ 7151. Bona fide purchaser

"Bona fide purchaser" has the same meaning as defined in Section 8302 of the Commercial Code.

(Added by Stats.1980, c. 600, p. —, § 4.)

§ 7152. Buyer in ordinary course of business

"Buyer in ordinary course of business" has the same meaning as defined in Section 1201(9) of the Commercial Code.

(Added by Stats.1980, c. 600, p. —, § 4.)

§ 7153. Chattel paper

"Chattel paper" has the same meaning as defined in Section 9105 (1)(b) of the Commercial Code.

(Added by Stats.1980, c. 600, p. —, § 4.)

§ 7154. Deposit account

"Deposit account" has the same meaning as defined in Section 9105(1)(e) of the Commercial Code.

(Added by Stats.1980, c. 600, p. —, § 4.)

§ 7155. Duly negotiated

"Duly negotiated" has the same meaning as defined in Section 7501 of the Commercial Code.

(Added by Stats.1980, c. 600, p. —, § 4.)

§ 7156. Holder in due course

"Holder in due course" has the same meaning as defined in Section 3302 of the Commercial Code.

(Added by Stats.1980, c. 600, p. —, § 4.)

§ 7157. Instrument

"Instrument" has the same meaning as defined in Section 9105 (1)(i) of the Commercial Code.

(Added by Stats.1980, c. 600, p. —, § 4.)

§ 7158. Personal property

"Personal property" includes both tangible and intangible personal property.

(Added by Stats.1980, c. 600, p. —, § 4.)

§ 7159. Purchase money security interest

"Purchase money security interest" has the same meaning as defined in Section 9107 of the Commercial Code.

(Added by Stats.1980, c. 600, p. —, § 4.)

§ 7160. Real property

"Real property" includes any rights in real property.

(Added by Stats.1980, c. 600, p. —, § 4.)

§ 7161. Security

"Security" has the same meaning as defined in Section 8102 of the Commercial Code.

(Added by Stats.1980, c. 600, p. —, § 4.)

§ 7162. State tax lien

"State tax lien" means a lien created pursuant to Section 8048 of the Fish and Game Code, Section 3423 or 3772 of the Public Resources Code, Section 6757, 7872, 8996, 16063, 18881, 26161, 30322, 32363, or 38532 of the Revenue and Taxation Code, or Section 1703 of the Unemployment Insurance Code.

(Added by Stats.1980, c. 600, p. —, § 4.)

§ 7163. Tax

"Tax" means a liability for which a state tax lien has been created.

(Added by Stats.1980, c. 600, p. —, § 4.)

§ 7164. Taxpayer

"Taxpayer" means the person liable for the tax.

(Added by Stats.1980, c. 600, p. —, § 4.)

Article 2

STATE TAX LIENS

Sec.

7170. Attachment to all property and rights to property including after-acquired property and rights; ownership; location in state; invalidity of lien against prior rights of certain persons.

7170.5. Priority of lien first in existence; effect of recording or filing notice.

7171. Notice of tax lien; recordation or filing; contents.

7172. Continuation of lien from creation, recordation or filing; time; extinguishment; extension.

7173. Extension of lien to taxpayer's cause of action and judgment; notice of lien; endorsement on judgment.

7174. Release or subordination of lien by agency; certificate of release.

Article 2 was added by Stats.1980, c. 600, § 4.

Article 2 is operative Jan. 1, 1981.

§ 7170. Attachment to all property and rights to property including after-acquired property and rights; ownership; location in state; invalidity of lien against prior rights of certain persons

(a) Except as provided in subdivisions (b) and (c), a state tax lien attaches to all property and rights to property whether real or personal, tangible or intangible, including all after-acquired property and rights to property, belonging to the taxpayer and located in this state.

(b) A state tax lien is not valid as to real property against the right, title, or interest of any of the following persons where the person's right, title, or interest was acquired or perfected prior to recording of the notice of state tax lien in the office of the county recorder of the county in which the real property is located pursuant to Section 7171:

(1) A successor in interest of the taxpayer without knowledge of the lien.

(2) A holder of a security interest.

(3) A mechanic's lienor.

(4) A judgment lien creditor.

(c) A state tax lien is not valid as to personal property against:

(1) The holder of a security interest in the property whose interest is perfected pursuant to Section 9303 of the Commercial Code

prior to the time the notice of the state tax lien is filed with the Secretary of State pursuant to Section 7171.

(2) Any person (other than the taxpayer) who acquires an interest in the property under the law of this state without knowledge of the lien or who perfects an interest in accordance with the law of this state prior to the time that the notice of state tax lien is filed with the Secretary of State pursuant to Section 7171.

(3) A buyer in ordinary course of business who, under Section 9307 of the Commercial Code, would take free of a security interest created by the seller.

(4) Any person (other than the taxpayer) who, notwithstanding the prior filing of the notice of the state tax lien:

(A) Is a holder in due course of a negotiable instrument.

(B) Is a holder to whom a negotiable document of title has been duly negotiated.

(C) Is a bona fide purchaser of a security.

(D) Is a purchaser of chattel paper or an instrument who gives new value and takes possession of the chattel paper or instrument in the ordinary course of business.

(E) Is a holder of a purchase money security interest.

(F) Is a collecting bank holding a security interest in items being collected, accompanying documents and proceeds, pursuant to Section 4208 of the Commercial Code.

(G) Acquires a security interest in a deposit account or in the beneficial interest in a trust or estate.

(H) Acquires any right or interest in letters of credit, advices of credit, or money.

(I) Acquires without actual knowledge of the state tax lien a security interest in or a claim in or under any policy of insurance including unearned premiums.

(J) Acquires any right or interest in property subject to a certificate of title statute of another jurisdiction under the law of which indication of a security interest on the certificate of title is required as a condition of perfection of the security interest.

(Added by Stats.1980, c. 600, p. —, § 4.)

§ 7170.5. Priority of lien first in existence; effect of recording or filing notice

Notwithstanding Section 7170, as between competing state tax liens or as between a state tax lien and a federal lien described in

Section 2100 of the Code of Civil Procedure, the lien that first comes into existence has priority over the lien that later comes into existence; and this priority is not affected by the recording or filing pursuant to Section 7171 or pursuant to Title 7 (commencing with Section 2100) of Part 4 of the Code of Civil Procedure, of a notice of either or both of the liens.

(Added by Stats.1980, c. 600, p. —, § 4.)

Appendix D

Extract from Report on Personal Property Security
(LRC 23, 1975)

CHAPTER I. INTRODUCTION

A. The Purpose of Security Interests

People in all walks of life frequently feel the need or the desire to obtain the use of commodities despite a present inability to pay for them. Need and desire may outstrip the capacity to pay. In such a case, a person may seek to obtain credit. Credit involves the willingness of a person (the creditor) to make a loan to the person seeking credit (the debtor). The creditor hopes and expects that the debtor will repay to him the amount of the loan, usually with an additional amount to compensate the creditor for allowing the debtor use of the money. This additional amount generally takes the form of a percentage annual rate of interest on the loan.

But advancing money in the form of a loan is a risky business. The debtor may not be able to repay the loan; he may go bankrupt; and although it appears to the creditor that the debtor would have sufficient assets to discharge the loan, it may transpire that there are a dozen other creditors all claiming repayment of similar amounts. A person with substantial liquid assets at his disposal might be quite willing, in principle, to lend money in return for the interest the debtor is prepared to pay him, but in practice he will often only be prepared to do so if some way can be found of minimizing the risk that he will never see his money again.

The grant of a security interest to the creditor in certain assets belonging to the debtor is an attempt to reinforce the creditor's prospect of receiving repayment of the loan. In essence, what the creditor gets is a right to reimburse himself out of these assets if the debtor fails to pay. The creditor's right to a charge or lien on particular assets of the debtor if the creditor does not receive payment from the debtor is called a security interest.

Security interest take many forms, and may be classified in various different ways. Some, such as tax liens, mechanics' liens, and liens of the Workers' Compensation Board, are created by statute. Others, such as the liens of innkeepers, solicitors, and artificers, are created under the common law. Still others, such as the mortgage, conditional sale, and pledge, are created by express agreement between the parties. Some security interests are given in respect of personal property, others in respect of real property. Some are given to secure a sum owed by the debtor to a person who supplied goods (vendor credit), others are given to secure a sum advanced to the debtor to enable him to purchase goods or services (lender credit).

In this Report we propose to consider the law relating to security interests in personal property created by agreement between the parties. Throughout, the term "security interest" is used, and by this we mean a consensual personal property security interest, unless the expression is qualified in such a way as to indicate some other meaning.

B. Security Interests in the Present Law

In the course of several centuries of common law development and a century of statutory intervention, various techniques of creating security interests have come to be recognized. The difficulties and disadvantages of the present law can only be understood in the light of the limitations which these techniques impose upon the creation of a security interest. We therefore give a summary account of security interests and the present law.

1. THE CONDITIONAL SALE

Under a conditional sale agreement, the seller reserves title to the goods until the condition specified in the agreement is satisfied. Where a conditional sale agreement is used as a security device, the condition required to be satisfied is invariably payment of the price. Conditional sale agreements are regulated by the *Conditional Sales Act.*[1] The conditional sale must be registered at the office of the Registrar-General or, if the buyer is a corporation and the goods are not a motor-vehicle, at the office of the Registrar of Companies.[2] Failure to register within 21 days of the signing of the conditional sale agreement[3] renders the seller's security interest void as against, *inter alia,* a trustee in bankruptcy, execution creditors, and bona fide transferees for value.[4]

2. THE CHATTEL MORTGAGE

A chattel mortgage is the transfer of title to the mortgagee for the purpose of securing a loan by the mortgagee to the mortgagor. Possession of the mortgaged property generally remains with the mortgagor, although this is not necessary. Under the *Bills of Sale Act*[5] a chattel mortgage must be registered at the office of the Registrar-General or, if the mortgagor is a corporation and the subject-matter is not a motor-vehicle, at the office of the Registrar of Companies.[6] Failure to register within 21 days after making a bill of sale[7] renders the mortgage void as against, *inter alia,* a trustee in bankruptcy, execution creditors, and bona fide transferees for value.[8]

3. THE PLEDGE

Under a pledge, the owner of goods (pledgor) gives possession of the goods to a pledgee as security for a loan. Title to the goods remains in the pledgor, but the pledgee may retain possession until the sum owing to him is paid. There is no registration requirement for the validation of a pledge as against parties claiming an interest in the goods, execution creditors of the pledgor, or the pledgor's trustee in bankruptcy.

4. THE FLOATING CHARGE

The floating charge is an interest in corporate property granted to a lender, generally a debenture-holder, which attaches or "crystallizes" on the happening of certain defined events. Prior to crystallization, the company is free to deal with the property subject to the charge in the ordinary course of business. Once the charge crystallizes, it becomes a fixed charge. Subject to the provisions of the debenture, the charge generally crystallizes on the liquidation of the company, or on the debenture-holders taking possession of the property charged or appointing a receiver.

5. THE ASSIGNMENT OF BOOK DEBTS

In many situations, a person seeking credit may find that his most valuable and liquid asset consists of receivables due from his customers who have themselves bought on credit. These receivables may be assigned to a financer[9] as security for an advance. Under the *Assignment of Book Accounts Act,*[10] an assignment of book accounts must be registered at the office of the Registrar-General,[11] or, if the assignor is a corporation, at the office of the Registrar of Companies.[12] Failure to register within 21 days of the assignment[13] renders the assignment void as against the assignor's trustee in bankruptcy, execution creditors, and bona fide transferees for value.[14] Certain assignments of debts are excluded from the registration requirement, notably assignments of "a debt or debts due at the date of the assignment from a specified debtor or specified debtors"[15] and of "a debt or debts growing due or to grow due under a specified contract or specified contracts."[16]

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[1] S.B.C. 1961, c. 9. [2] *Ibid.* s. 5. [3] *Ibid.* s. 6. [4] *Ibid.* s. 15. [5] S.B.C. 1961, c. 6.
[6] *Ibid.* s. 9. [7] *Ibid.* s. 10. [8] *Ibid.* s. 16.

[9] We use the term "financer" to indicate a professional lender and, particularly, a secured lender.

[10] S.B.C. 1961, c. 4. [11] *Ibid.* s. 8 (1). [12] *Ibid.* s. 8 (2).

6. ASSIGNMENTS UNDER SECTION 88 OF THE BANK ACT (CAN.)

Under section 88 of the *Bank Act* (Can.),[17] banks are authorized to take security interests in a wide range of items which are so defined that the over-all effect is to authorize the banks to grant secured financing to industrial manufacturers, farmers, and fishermen and to wholesalers and shippers of natural products. The agreement granting the security interest need not be registered, although a "Notice of Intention" in the appropriate statutory form must be registered in the provincial office of the Bank of Canada. This document is required to be signed by the debtor and simply records the fact of the debtor's intention to grant a section 88 security interest, together with the debtor's name and address.

7. THE LEASE

In most people's minds, a lease is usually associated with real property. In recent years, however, the practice of obtaining the use and possession of certain types of goods under a lease has become common. The lease is most commonly used in connection with the financing of a transfer of equipment. There are no registration requirements, although if an option to purchase the goods is given to the lessee, the transaction is a conditional sale and requires registration accordingly.[18]

C. Difficulties of the Present Law

The present law of personal property security suffers from a number of difficulties. The most obvious of these is the bewildering complexity and lack of systematization of the law. This appearance of disarray stems from the fact that our legislators and judges have never accepted the notion of a security interest in personal property as a functional and conceptual unit of reckoning. Different security devices have grown up, each with its own set of technical rules. This growth has been fostered by a preoccupation with matters of title. The question of who had title and what happened to it has been taken as the determinant of the kind of transaction that was involved, and hence as the determinant of what set of technical rules were the right ones to apply. The functional unity of the security interest has been overlooked as judges and legislators, when considering one form of security device, have allowed themselves to become insulated from developments that have occurred in respect of other security devices. Despite the similarity of economic function of each of those devices, there has been no comprehensive and systematic review of the law of personal property security as a whole. In the final result, the present law consists of a mass of technical rules, with different requirements for different security devices.

This failure to perceive and act on the functional unity of the security device has given rise to considerable problems, particularly with respect to wholesale financing. Many of these problems have been discussed and analysed by leading commentators in the field of personal property security law. A full elaboration would require a work of considerable scope. Here, we list a few of the difficulties which we have encountered.

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[13] *Ibid.* s. 9. [14] *Ibid.* s. 12. [15] *Ibid.* s. 2 (*f*). [16] *Ibid.* s. 2 (*g*). [17] R.S.C. 1970, c. B-1.

[18] *See Conditional Sales Act, supra* n. 1, s. 2.

The *Bills of Sale Act* and the *Conditional Sales Act* contain no special provisions relating to wholesale inventory financing. The significant feature of inventory financing is that it presupposes a long-term relationship between the parties, with new inventory being obtained by the dealer from time to time as his old stock is sold off. The amount of the indebtedness will vary from time to time as and when the dealer accounts to his financer with the proceeds of a sale, and as the financer makes new advances to facilitate the purchase of new stock. This kind of relationship between dealers and financer must be carried on with a minimum of formality. To be effective in regulating this type of transaction the law must be able to provide for a continuing security interest, in favour of the financer, against a mass of shifting collateral. The law must permit future advances to receive the protection of the security interest, permit the financer to follow his interest into the proceeds of collateral, and permit the security interest to embrace after-acquired collateral, all with a minimum of formality. On these matters the present law is deficient.

It is not clear in many instances how effective are security interests involving future property and future advances. In some instances, for no clear reasons of policy, such interests cannot be created at all because of the conceptual limitations which surround a particular security device. In other cases the creation of such security interests is either precluded or made unnecessarily difficult by the formal requirements of the relevant legislation. Where, for example, it is intended to supply inventory to a dealer on a continuing basis, a new conditional sale agreement must be executed and registered for each lot of goods supplied. The conditional sale agreement is conceptually inappropriate for including future goods which have not been agreed upon, and the description requirements involved in registration preclude the possibility of including all future goods in a single agreement. Theoretically, the chattel mortgage can embrace future goods, but when the future goods are acquired by the dealer the secured party's interest remains vulnerable to later legal interests under the rule in *Holroyd* v. *Marshall.*[19] Moreover, the status of future advances is not clear under our chattel mortgage legislation. The result is that an effective security interest in inventory is difficult to achieve in the uncongenial climate of the present law.

Another feature of the present law is that it is impossible to combine different forms of security arrangement in a single transaction with a single act of registration. If a manufacturer wishes to borrow from a single lender on the security of his inventory and his accounts receivable, under Provincial legislation two separate agreements and acts of registration are required. Again, in some instances a particular transaction may be capable of expression either as a conditional sale or a chattel mortgage, but attendant formalities, as well as substantive rights and remedies, will differ according to which form is adopted. It is hard to find convincing reasons of policy for anomalies of this kind. In some instances the growth of new patterns of secured financing has been inhibited by the stranglehold that existing security devices have gained. Thus, the trust receipt, a financing device well-recognized in the United States and in England, has been held to be a mortgage in Canada and, as such, has been robbed of its efficacy. In other instances, transactions which may have a security function, such as the sale on consignment and the lease, have escaped regulation because they did not fit into the technical framework of the separate security devices.

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[19] (1862) 10 H.L.C. 191.

In addition to the difficulties of substance inherent in the present law, the various requirements of formality are also a fruitful source of problems. Mr. Fred Catzman, Q.C., of the Toronto Bar, said in 1967 in the course of the W. C. J. Meredith Memorial Lectures:

> It is routine practice for the trustee in bankruptcy to instruct his solicitor to examine the validity of security documents given by the bankrupt. The most profitable inquiry, particularly in the case of chattel mortgages, has been not in the area of fraudulent preference, as one might expect, but rather to search for technical flaws that contravene the formalities prescribed by the Act.

Another consequence of the growth of the separate security devices has been that there is no over-all scheme of priorities as between one device and another. Each security device has developed in its own context, with attention being directed at the requirements, whether legislative or common law, for obtaining an enforceable security agreement. Little explicit attention has been paid to resolving priority between two apparently enforceable interests.

It would be wearisome to itemize the multitude of particular problems which reflect the law's failure to keep pace with the practical developments relating to secured financing. Specific examples may be of assistance in focusing on the problems. Here are but a tiny sample:

(1) As stated above, the ability to provide for future advances is an important element of modern inventory financing. The *Bills of Sale Act* is silent on whether a mortgagor of chattels may grant security in respect of an advance to be agreed upon and made in the future. Is the implication that what the Act does not outlaw is permissible, or that what the Act does not sanction is prohibited? Section 3 of the Act, which is titled "Attestation," requires that a bill of sale "set forth the true consideration for which it was given." Since where future advances are involved (except those made pursuant to prior commitment) it is impossible to specify the consideration at the time of grant, does this mean that the Act prohibits future advances? Can requirements of formality be allowed to dictate the scope and operation of the substantive law? Is there any rational policy ground on which such results can be supported?

(2) Another important feature of an effective personal property security law is its ability to provide for security interests in after-acquired property. It cannot be done at all under a conditional sale agreement since the structure of such a transaction would be incompatible with an interest in future goods, and it is unclear how far this can be done under present mortgage law. The *Bills of Sale Act* provides, in section 3 (2), that "where a bill of sale comprises a motor-vehicle," the serial number of the vehicle must be registered. But, unlike other Provincial statutes, there is no general requirement that there be "a sufficient and full description of the goods." One of the difficulties with security interests in future goods is satisfying the requirements of description, since no particular items are available to be described at the time of execution of the security

agreement and registration of the security interest. Is the effect of our Act that, generally speaking, security interests in after-acquired property are permissible, motor-vehicles being an exception? Or would other kinds of goods capable of description by item, such as through a serial number or manufacturer's identification number, be treated by analogy with motor-vehicles? Or are security interests in future goods to be regarded as forbidden since the Act does not expressly sanction them?

(3) Even if, in general, security interests in after-acquired property are permissible, there are other difficulties with them. The mortgagee's registration is not generally regarded as notice to third parties. Moreover, when the future goods are acquired by the mortgagor, the mortgagee gets, at most, an equitable interest in them and hence is vulnerable to later innocent legal interests. This difficulty first emerged in English 19th century case law relating to the assignment of future book accounts and goods. With regard to accounts, this is no longer a problem in British Columbia due to the combination of sections 2 (*e*) and 14 of the *Assignment of Book Accounts Act*, which in part do away with the rules in *Holroyd* v. *Marshall*[20] and *Dearle* v. *Hall*.[21] While this is a useful development, the law is left in the anomalous position that registration under the *Bills of Sale Act* is not notice, whereas registration under the *Assignment of Book Accounts Act*, broadly speaking, is notice. To complete the lack of coherence of this picture, no after-acquired property interest may be granted as part of a conditional sale agreement. Thus, future interests seem to be reasonably secure as to accounts, of uncertain status as to mortgages of goods, and impossible as part of conditional sales of goods.

Clearly the law is in disarray and the inhibitions which it places on contemporary commercial financing do a disservice to the community as whole.

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[20] *Ibid.*

[21] (1828) 3 Russ. 1; 38 E.R. 475.

Appendix E

Statutory Provisions that Relate to the Crown's Right of Distress

CHAPTER 69
CORPORATION CAPITAL TAX ACT

Recovery by distress

43. (1) The commissioner may, by himself or his agent, levy the amount of the tax that is due and payable, with costs, by distress of the goods and chattels of the corporation liable to pay the tax, or of any goods and chattels in its possession, wherever they may be found in the Province, or of any goods and chattels found on its premises the property of or in the possession of any other occupant of the premises, and that would be subject to distress for arrears of rent due to a landlord. The costs chargeable shall be those payable as between landlord and tenant.

(2) Where distress is made, the commissioner or his agent shall, by advertisement posted up in at least 3 conspicuous public places in the locality where the sale of the property distrained is to be made, give at least 10 days' public notice of the time and place of the sale and of the name of the corporation in default. At the time named in the notice the commissioner or his agent shall sell at public auction the property distrained, or so much as may be necessary.

(3) If the property distrained is sold for more than the amount of the tax and costs, and if no claim to the surplus is made by any other person on the ground that the property sold belonged to him, or that he was entitled by lien or other right to the surplus, the surplus shall be paid over to the person in whose possession the property was when the distress was made, and his receipt shall be taken.

(4) If a claim is made by the corporation for whose tax the property was distrained, and the claim is admitted, the surplus shall be paid to the corporation, and its receipt shall be taken.

(5) If the claim is contested, the surplus shall be retained by the commissioner until the rights of the parties have been determined in court or otherwise.

Powers exercisable separately

44. The powers conferred by this Act for the recovery of tax by action in court, by filing a certificate, by distress and by demand under section 42 may be exercised separately, or concurrently, or cumulatively. The liability of a corporation for the payment of the tax under this Act shall not be affected in any way by the fact that a fine has been paid or a penalty imposed on it for a contravention of this Act.

CHAPTER 205
INSURANCE PREMIUM ACT

Distress

24. (1) The commissioner may, by himself or his agent, levy the amount of tax that is due and payable, with costs, by distress of the goods and chattels of the person liable to pay the tax, or of goods and chattels in his possession, wherever they may be found within the Province, or of goods and chattels found on his premises the property of or in the possession of any other occupant of the premises and that would be subject to distress for arrears of rent due to a landlord; and the costs chargeable are those payable as between landlord and tenant.

(2) If distress is made for the recovery of a tax, the commissioner or his agent shall, by advertisement posted in at least 3 conspicuous public places in the locality where the sale of the property distrained is to be made, give at least 10 days' notice of the time and place of sale and of the name of the taxpayer whose property is to be sold. At the time named in the notice the commissioner or his agent shall sell at public auction the property distrained, or so much of it as may be necessary.

(3) If the property distrained is sold for more than the amount of the tax and costs, and no claim to the surplus is made by another person on the ground that the property sold belonged to him, or that he was entitled by lien or other right to the surplus, the surplus shall be paid to the person in whose possession the property was when the distress was made, and his receipt shall be taken for it.

(4) If a claim is made by the person for whose taxes the property was distrained, and the claim is admitted, the surplus shall be paid to him, and his receipt shall be taken for it.

(5) If the claim is contested, the surplus shall be retained by the commissioner until the respective rights of the parties have been determined by action at law or otherwise.

Exercise of recovery powers

25. The powers conferred by this Act for recovery of taxes by action in court, by filing a certificate, by distress and by demand under section 23 may be exercised separately, concurrently or cumulatively, and the liability of a person for payment of a tax under this Act is not affected by the fact that a fine or penalty has been imposed on or paid by him for a contravention of this Act.

CHAPTER 248
LOGGING TAX ACT

Distress

33. (1) The commissioner may, by himself or his agent, levy the amount of a tax that is due and payable, with costs, by distress of the goods and chattels of the person liable to pay the tax, or of any goods and chattels in his possession, wherever they may be found within the Province, or of any goods and chattels found on his premises the property of or in the possession of any other occupant of the premises, and that would be subject to distress for arrears of rent due to a landlord; and the costs chargeable shall be those payable as between landlord and tenant.

(2) If distress is made for the recovery of a tax, the commissioner or his agent shall, by advertisement posted up in at least 3 conspicuous public places in the locality where the sale of the property distrained is to be made, give at least 10 days' public notice of the time and place of the sale and of the name of the taxpayer whose property is to be sold; and at the time named in the notice the commissioner or his agent shall sell at public auction the property distrained, or as much of it as may be necessary.

(3) If the property distrained is sold for more than the amount of the tax and costs, and if no claim to the surplus is made by any other person on the ground that the property sold belonged to him, or that he was entitled by lien or other right to the surplus, the surplus shall be paid over to the person in whose possession the property was when the distress was made, and his receipt shall be taken for it.

(4) If a claim is made by the person for whose taxes the property was distrained, and the claim is admitted, the surplus shall be paid to the claimant, and his receipt shall be taken for it.

(5) If the claim is contested, the surplus shall be retained by the commissioner until the respective rights of the parties have been determined.

Powers exercisable

34. The powers conferred by this Act for the recovery of taxes by action in court, by filing a certificate, by distress and by demand under section 32 may be exercised separately, or concurrently, or cumulatively. The liability of a person for the payment of a tax under this Act shall not be affected in any way by the fact that a fine or penalty has been imposed on or paid by him in respect of a contravention of this Act.

CHAPTER 260
MINERAL LAND TAX ACT

Certificate of delinquent taxes

12. (1) Where mineral land tax or any portion of mineral land tax is delinquent, the administrator may issue a certificate stating that the tax is delinquent, the amount of it that is unpaid, including interest, and the name of the person liable to pay it and may

- (a) file the certificate with the Supreme Court or with a County Court and, on filing the certificate has the same force and effect and all proceedings may be taken on it as if it were a judgment of the court for the recovery of a debt of the amount stated in the certificate against the owner named in it; and
- (b) issue a warrant to a person for the purpose of levying the amount of mineral land tax stated in the certificate, with costs, by distress of the goods and chattels of the owner liable to pay the mineral land tax or of any goods and chattels in his possession, wherever they may be found in the Province or of any goods and chattels found on his premises or in the possession of any other occupant of the premises and that would be subject to distress for arrears of rent due to a landlord. The costs chargeable shall be those payable as between landlord and tenant.

(2) Where the property distrained is sold for more than the amount of the mineral land tax, interest and costs and where no claim to the surplus is made by any other person on the ground that the property sold belonged to him or that he was entitled by lien or other right to the surplus, the surplus shall be paid over to the owner who was liable to pay the delinquent mineral land tax.

(3) Where a claim for a surplus is made by a person other than the owner for whose mineral land tax the property was distrained and the claim is admitted by the owner, the surplus shall be paid to that other person and his receipt shall be taken for it.

(4) Where a claim for a surplus is contested, the surplus shall be retained by the administrator until the rights of the parties have been determined.

CHAPTER 263
MINERAL RESOURCE TAX ACT

Distress

34. (1) The commissioner may levy the amount of a tax that is due and payable with costs, by distress

(a) of goods and chattels of the person liable to pay the tax;

(b) of goods and chattels in the possession of that person, wherever they may be found in the Province; or

(c) of goods and chattels found on the premises of that person, the property of or in the possession of any other occupant of the premises,

and that would be subject to distress for arrears of rent due to a landlord, and the costs chargeable are those payable as between landlord and tenant under the *Rent Distress Act*.

(2) Where distress is made for the recovery of a tax, the commissioner shall, by advertisement posted up in at least 3 conspicuous public places in the locality where the sale of the property distrained is to be made, give

(a) at least 10 days' public notice of the time and place of the sale; and

(b) the name of the operator whose property is to be sold,

and at the time named in the notice the commissioner or his agent shall sell at public auction the property distrained, or as much of it as may be necessary.

(3) If the property distrained is sold for more than the amount of the tax and costs and if no claim to the surplus is made by any other person on the ground that the property sold belonged to him or that he was entitled by lien or other right to the surplus, the surplus shall be paid to the person in whose possession the property was when the distress was made and his receipt shall be taken for it.

(4) If a claim is made by the person for whose taxes the property was distrained, and the claim is admitted, the surplus shall be paid to the claimant and his receipt shall be taken for it.

(5) If the claim is contested, the surplus shall be retained by the commissioner until the respective rights of the parties have been determined.

Powers exercisable

35. The powers conferred by this Act for the recovery of taxes by action in court, by filing a certificate, by distress and by a demand under section 33, may be exercised separately, concurrently or cumulatively and the liability of a person for the payment of a tax under this Act is not affected by the fact that a fine or penalty has been imposed on or paid by him for a contravention of this Act.

CHAPTER 267
MINING TAX ACT

Distress

33. (1) The commissioner may, by himself or his agent, levy the amount of a tax that is due and payable, with costs, by distress of goods and chattels of the person liable to pay the tax or of goods and chattels in his possession, wherever they may be found in the Province, or of goods and chattels found on his premises the property of or in the possession of any other occupant of the premises and that would be subject to distress for arrears of rent due to a landlord. The costs chargeable are those payable as between landlord and tenant.

(2) If distress is made for the recovery of a tax, the commissioner or his agent shall, by advertisement posted up in at least 3 conspicuous public places in the locality where the sale of the property distrained is to be made, give at least 10 days' public notice of the time and place of the sale and of the name of the taxpayer whose property is to be sold. At the time named in the notice the commissioner or his agent shall sell at public auction the property distrained or so much of it as may be necessary.

(3) If the property distrained is sold for more than the amount of the tax and costs and if no claim to the surplus is made by any other person on the ground that the property sold belonged to him or that he was entitled by lien or other right to the surplus, the surplus shall be paid to the person in whose possession the property was when the distress was made and his receipt shall be taken for it.

(4) If a claim is made by the person for whose taxes the property was distrained and the claim is admitted, the surplus shall be paid to the claimant and his receipt shall be taken for it.

(5) If the claim is contested, the surplus shall be retained by the commissioner until the respective rights of the parties have been determined by action at law or otherwise.

Powers exercisable

34. The powers conferred by this Act for the recovery of taxes by action in court, by filing a certificate, by distress and by a demand under section 32 may be exercised separately, concurrently or cumulatively. The liability of a person for the payment of a tax under this Act is not affected in any way by the fact that fine or penalty has been imposed on or paid by him for a contravention of this Act.

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